Petition

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In the Supreme Court of the United States

OCTOBER TERM, 1981

NO. _____

MARTINS FERRY HOSPITAL ASSOCIATION,
PETITIONER,
v.

NATIONAL LABOR RELATIONS BOARD, et. al.,
RESPONDENTS.

PETITIONER MARTINS FERRY HOSPITAL ASSOCIATION'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a Party-Respondent to an unfair labor practice charge under investigation by the National Labor Relations Board have a clear and certain right, as a party to a proceeding, to have the Board issue to it a subpoena under §11(1) of the National Labor Relations Act?

2. May a Party-Respondent to an unfair labor practice charge under investigation by the National Labor Relations Board obtain union authorization cards in the Board's possession under the Freedom of Information Act?

3. Does the National Labor Relations Board violate the Due Process rights of a Party-Respondent, to an unfair labor practice charge under investigation by the Board, by engaging in discovery relating to a possible remedy before issuing a complaint and without extending to the Party-Respondent an opportunity for similar discovery?

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PETITIONER MARTINS FERRY HOSPITAL ASSOCIATION'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Martins Ferry Hospital,[1] the petitioner herein, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Sixth Circuit in these cases.

OPINIONS BELOW

The opinion of the Court of Appeals in Case No. 80-3118[2] is unreported and appears in the Appendix

[1]Martins Ferry Hospital Association, the petitioner herein, states that this is its original Designation of Corporate Relationships. Martins Ferry Hospital Association is an Ohio not-for-profit corporation. It is not owned by any parent corporation and has no subsidiaries or affiliates.

[2]Martins Ferry Hospital Association, Plaintiff-Appellant; National Labor Relations Board, John Fanning, Chairman, and Bernard Levine, Regional Director, Defendants-Appellees.

hereto at A-1. The opinion of the District Court in Case No. C-2-79-826 is unreported and appears in the Appendix hereto at B-1.

The opinion of the Court of Appeals in Case Nos. 79-3408-09[3] is reported at 649 F.2d 445 (6th Cir. 1981) and appears in the Appendix hereto at A-4. The opinions of the District Court in Case No. C-2-78-529 and Case No. C-2-78-785 are unreported and appear in the Appendix hereto at B-11 and B-21, respectively.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit in Case Nos. 79-3408-09 was entered on May 27, 1981. The judgment of the Court of Appeals for the Sixth Circuit in Case No. 80-3118 was entered on July 17, 1981. The jurisdiction of this court in both cases is invoked under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory provision involved in Case No. 80-3118 is §11(1) of the National Labor Relations Act, 29 U.S.C. §161(1), which appears in the Appendix hereto at D-1.

The statutory provisions involved in Case Nos. 79-3408-09 are the Freedom of Information Act, 5 U.S.C. §552 et seq., and Exceptions 6 and 7(A) thereto, 5 U.S.C. §552 (b) (6) and (7) (A), which appear in the Appendix hereto at D-2.

The constitutional provision involved in Case Nos. 79-3408-09 is the Fifth Amendment, which provides in part:

> . . . nor deprived of life, liberty, or property, without due process of law . . .

[3]Martins Ferry Hospital Association, Plaintiff-Appellant and Defendant-Appellant; National Labor Relations Board, Defendant-Appellee and Plaintiff-Appellee, and Bernard Levine, Defendant-Appellee.

STATEMENT OF THE FACTS

Martins Ferry Hospital Association ("Hospital") is an Ohio not-for-profit organization that operates a general, acute care hospital in Martins Ferry, Ohio. On September 15, 1976, the Licensed Practical Nurse and Skilled Employees Professional and Economic Security Program, Inc. ("LPN-SHEP"), a labor organization, filed with the National Labor Relations Board (the "Board") a petition requesting that an election be held among the Hospital's technical employees. LPN-SHEP claimed to represent at least 30% of the Hospital's technical employees, and also purportedly submitted to the Board authorization cards signed by the employees designating LPN-SHEP as their collective bargaining representative.

Another labor organization, Local 1199, National Union of Hospital and Health Care Employees ("Local 1199"), filed three petitions with the Board seeking representation of three separate units of the Hospital's employees — business office clerical unit, service and maintenance unit, and technical unit. Two of these three petitions claimed that 30% or more of the employees in the requested unit supported Local 1199 as their collective bargaining representative. The third petition, the technical unit petition, averred that a substantial number of employees supported Local 1199. Local 1199 submitted to the Board authorization cards purportedly signed by the employees in support of these claims. On September 30, 1976, LPN-SHEP, in connection with a third labor organization, intervened with respect to Local 1199's petition for the Hospital service and maintenance employees in an attempt to represent such unit.

A Regional Director of the Board ordered elections in the three voting units petitioned for by the labor organizations. On December 16, 1976, the Board conducted elections at the Hospital. A majority of the eligible voters in each unit voted against representation by any labor organization. Local 1199 filed several objections to the election, alleging pre-election misconduct by the Hospital.

On January 24, 1977, Local 1199 converted its election objections into unfair labor practice charges against the Hospital, averring that various alleged actions by the Hospital made it impossible to have a free and fair election at the Hospital. Local 1199 also claimed that it represented a majority of the Hospital's employees and that the Hospital unlawfully refused to bargain with this union. Pursuant to this allegation, Local 1199 asked the Board to issue an order requiring the Hospital to bargain with it as the exclusive representative of the employees in the respective bargaining units.

On April 21, 1978, at the request of the General Counsel of the Board, the Board issued a subpoena duces tecum requiring the Hospital to produce IRS W-4 forms, or if such forms were unavailable, other documents bearing signatures of all employees in the involved units covering the period from June through October, 1976. An agent of the Board has previously informed the Hospital that the General Counsel planned to issue an unfair labor practice complaint seeking a bargaining order against the Hospital. The General Counsel of the Board sought the Hospital's W-4 forms to permit him to conduct a signature comparison check with the union authorization cards he had been furnished by Local 1199, to determine if the union had in fact been *designated* the bargaining agent for a majority of the Hospital's employees in certain bargaining units. If Local 1199 had obtained a "majority status" in one or more bargaining units, and the Hospital had committed substantial unfair labor practices, the General Counsel would be free to seek a bargaining order remedy.

On June 1, 1978, the Board denied the Hospital's petition to revoke the subpoena. The Hospital declined to comply with the subpoena. On August 1, 1978, the Board filed an application in the U.S. District Court (Southern District of Ohio, Eastern Division) pursuant to 29 U.S.C. §161(2) for an order requiring that the Hospital obey its subpoena duces tecum for the W-4 forms. The District Court ordered that the subpoena be enforced. *N.L.R.B. v.*

Martins Ferry Hospital Association, Case No. C-2-78-785 (1979).

The Hospital likewise sought copies of the authorization cards so that it, too, could have an expert make a handwriting comparison. On June 5, 1978, the Hospital filed a complaint in the U.S. District Court (Southern District of Ohio, Eastern Division) under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552 (a) (4) (B), praying for an injunction requiring the Board to disclose copies of the membership authorization cards allegedly executed by the Hospital's employees. The District Court denied the injunction and held that the membership application cards are exempt from disclosure under Exemptions 6 and 7(A) of the FOIA. *Martins Ferry Hospital Association v. N.L.R.B.*, Case No. C-2-78-529 (1979).

The Hospital appealed the decisions of the District Court that a subpoena for W-4 forms is enforceable and that authorization cards held by the Board are exempt from disclosure under the FOIA, and the Court of Appeals for the Sixth Circuit stayed the District Court's judgment. After consolidating these two cases, the Court of Appeals for the Sixth Circuit modified the District Court's decision so that the Hospital need only provide copies of the W-4 forms in which all information is obscured except the full name, address, social security number, signature of the employee and the date the W-4 was signed. With this modification, the judgments of the District Court were affirmed. *N.L.R.B. v. Martins Ferry Hospital Association*, Case Nos. 79-3408-09.

On July 11, 1978, the Hospital requested that the Board issue it subpoenas directed to all labor organizations involved in the Board-conducted elections at the Hospital and to the individual who requested the Board subpoena ordering them to produce the authorization cards for inspection by the Hospital. Despite the Hospital's protestations that the Board was statutorily obligated pursuant to Section 11(1) of the National Labor Relations Act ("Act") and Section 102.31 of the Board's Rules

and Regulations to issue the subpoenas requested by t Hospital, on July 25, 1978, the acting Regional Director fused to issue the subpoenas. The Hospital filed an action the U.S. District Court (Southern District of Ohio, Easte Division) for mandamus relief under 28 U.S.C. §13 seeking an order compelling the Board to issue t requested subpoenas. The District Court and the U. Court of Appeals for the Sixth Circuit affirmed the acti Regional Director's decision. *Martins Ferry Hospit Association v. N.L.R.B.*, Case No. C-2-79-826 (S.D. Oh 1979); Case No. 80-3118 (6th Cir. 1981).

Both Case Nos. 79-3408-09 and Case No. 80-3118 ari from the same underlying facts and involve the sar basic issue: equal access by both the Board and t Hospital to evidence in a Board proceeding. For the reasons, and to expedite the resolution of the importa issues involved in these cases, the Hospital submits th petition for writ of certiorari seeking consolidation ar review of the Court of Appeals' decisions in these cas

REASONS FOR GRANTING THE WRIT

Review by this Court of the decisions of the Court Appeals is necessary to resolve three important issu The lower court decision conflicts with the interpretati of other courts as to what Board actions constitute "proceeding." This Court should also resolve the questi of first impression as to whether commercial documen such as authorization cards are exempt from disclosu under the FOIA. Finally the Court should consid whether certain discovery practices of the Board viola the due process rights of the Hospital.

The Court of Appeal in Case No. 80-3118 held th the Board did not have to comply with the Hospital request that it issue a subpoena under §11(1) of t National Labor Relations Act. Second, in Case No 79-3408-09 the Court of Appeals held that, prior to fili an unfair labor practice complaint, the Board cou subpoena certain information on employee W-4 forn

from an employer so as to enable the Board to authenticate the employee signature authorization cards. And third, in the same case, the court held that an employer does not have a corresponding due process right or an independent right under the FOIA, 5 U.S.C. §552, simultaneously to obtain authorization cards so as likewise to authenticate them.

As this petition will demonstrate, the panel's decisions (1) interpret Section 11(1) of the Act in a manner that is in conflict with a prior decision of this Court, decisions of other courts and the legislative history of the statute, (2) approve Board procedures which violate due process rights of charged parties, and (3) incorrectly apply the FOIA.

1. PURSUANT TO §11(1) OF THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. §161(1), THE NATIONAL LABOR RELATIONS BOARD HAS A MINISTERIAL DUTY TO ISSUE, UPON REQUEST DURING THE INVESTIGATIVE STAGE OF AN UNFAIR LABOR PRACTICE PROCEEDING, A SUBPOENA TO A PARTY CHARGED WITH THE COMMISSION OF AN UNFAIR LABOR PRACTICE.

A writ of mandamus under 28 U.S.C. §1361 should be issued to compel the Board to issue the requested subpoena if the Hospital establishes "that [it] had a clear and certain right and that the duties of the respondent are ministerial, plainly defined, and peremptory." *U.S. v. Battisti*, 486 F.2d 961 (6th Cir. 1973). The question in Court of Appeals Case No. 80-3118, then, is whether the Board's duty to issue subpoenas under §11(1) of the National Labor Relations Act, 29 U.S.C. 161(1), is ministerial, which in turn depends upon the meanings of "party" and "proceedings" within the context of §11(1).

1A. THE NATIONAL LABOR RELATIONS BOARD HAS A MINISTERIAL DUTY TO ISSUE SUBPOENAS TO A PARTY TO A PROCEEDING UNDER §11(1) OF THE ACT.

This Court has stated that the Board has a ministerial, plainly defined, and peremptory duty to issue subpoenas to a "party" to a "proceeding" within the meaning of §11(1) of the Act. In *D.B. Lewis v. N.L.R.B.*, 357 U.S. 10 (1958), this Court held:

> *The Act makes clear that the issuance of subpoenas is mandatory.* 'The Board or any member thereof, shall upon the application of any party . . . forthwith issue . . . [subpoenas] . . . ' *The only function remaining is ministerial.* Consequently the Board supplies blank [subpoenas] bearing its seal and the facsimile signature of a Board member to its regional offices and trial examiners. Upon application of a proper party, the subordinate official automatically issues the subpoena to the applicant. *There is involved no delegation of any act entailing the exercise of discretion . . . the agents issuing the [subpoena] perform ministerial acts only* . . . the command of the Act is to issue the subpoena 'forthwith' on application of any party. 357 U.S. at 14, 15. [footnotes omitted] (Emphasis added.)

The Board itself has accepted this statement of its duty under §11(1). See e.g., *Free-Flow Packaging Corporation*, 219 N.L.R.B. No. 119 (1975); *Louisiana Cement Company*, 241 N.L.R.B. No. 83 (1979).

1B. THE HOSPITAL IS A "PARTY" WITHIN THE MEANING OF §11(1).

The question, then, is whether the Hospital has a clear and certain right to a subpoena under §11(1). The Hospital has such a right if it is a "party" to a "proceeding" within the meaning of §11(1). The term "party" is not defined in the Act, but is defined by rule of the Board. Such rule defines as a party:

> [T]he regional director . . ., any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, . . . including, without limitation, any person filing a charge or

> petition under the act, any person named as respondent, as employer, or as a party to a contract . . . 29 C.F.R. §102.8.

The Hospital was a named party respondent in the unfair labor practice charges filed by Local 1199 — N.L.R.B. Case No. 8-CA-10755. It is the Board's investigation of the charge to which the requested subpoenas relate. The Hospital therefore clearly fits the definition in 29 C.F.R. §102.8 and is a "party" under §11(1) of the Act.

1C. THE INVESTIGATION OF AN UNFAIR LABOR PRACTICE CHARGE IS A "PROCEEDING" WITHIN THE MEANING OF §11(1).

The investigation of an unfair labor practice charge is also a "proceeding" within the meaning of §11(1). Section 11(1) provides:

> For the purpose of *all hearings and investigations*, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title —
>
> (1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of *any party to such proceedings*, forthwith issue to such party [subpoenas] requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a [subpoena] on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such [subpoena] if in its opinion the evidence whose

> production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such [subpoena] does not describe with sufficient particularity the evidence whose production is required. (Emphasis added.)

The wording of the statute demands the conclusion that an investigation is a "proceeding" within the meaning of the statute. The only logical construction of the second sentence of §11(1), which confers subpoena power upon the Board, is that "such proceedings" refers back to "*all* hearings *and* investigations" in the preamble. Section 11770 of the Board's Casehandling Manual claims there are *two* kinds of subpoenas: investigative and trial, and that *only* the General Counsel may obtain the former. There is simply no basis in the statute or its legislative history for this distinction.

The second sentence of §11(1) is the *only* grant of subpoena power to the Board. As Senator Taft said in the debates on the Taft-Hartley Act, 61 Stat. 136, 29 U.S.C. §§151 et seq., which rewrote §11: *"Section 11* authorized the Board to conduct hearings and investigations and *to subpoena witnesses."* 93 *Cong. Rec. 6445* (Emphasis added). In *D. B. Lewis v. N.L.R.B., supra*, the Court held that the General Counsel was a "party" within the meaning of the second sentence of §11(1) and was therefore permitted to request subpoenas. 357 U.S. at 17. Thus, the Court held that the General Counsel, in seeking subpoenas, must do so under *the same sentence of the same statute as the petitioner.* This being the case, any reading of the statute which held that subpoenas were not available in the investigatory stage of a proceeding would preclude *both* the petitioner *and* the General Counsel from obtaining subpoenas *before* a complaint is issued. In view of the General Counsel's "critical role . . . in the enforcement of the Act," 357 U.S. at 17, such a reading of the statute would be plainly nonsensical. Yet it is the only reading which will support the conclusion that

the present investigation is *not* a "proceeding" within the meaning of the Act. If the first sentence of §11(1), giving the Board *access* rights to any evidence of any person, it would have been *unnecessary* for the Court in *D.B. Lewis, supra*, to hold that the General Counsel was a "party" within the meaning of the second sentence.[4]

The uses of the word "proceedings" in the Board's rules and regulations also lead inescapably to the conclusion that the current investigation is a "proceeding," unless one makes the strained assumption that the word's meaning can vary in meaning from place to place in the regulations and between the regulations and the Act. When the plain meaning of a word is apparent, however, such unnatural constructions are unjustified. See Sands, *Sutherland Statutory Construction* §46.01 (4th ed. 1973).

The term "proceedings" is used in §101.4 of the Board's regulations pertaining to investigation of unfair labor practice charges, the precise stage of the instant case before the Board. This section states in pertinent part:

> Sec. 101.4 *Investigation of charges* — When the charge is received in the regional office it is filed, docketed, and assigned a case number . . . The regional director requests the person filing the charge to submit promptly evidence in its support. As part of the investigation hereinafter mentioned, the person against whom the charge is filed, herein-

[4]There is also no basis for any distinction between investigative and trial subpoenas in the Board's regulations governing the issuance of subpoenas. In 29 C.F.R. §102.31(1), two types of subpoenas are recognized: those sought "prior to the hearing" and those sought "during the hearing." There is no mention of any "investigative" subpoenas available to the General Counsel alone, nor is there any such mention in the general regulations governing investigations. 29 C.F.R. §101.4. Thus, if the General Counsel claims a right to investigatory subpoenas, he must find it in the authorization for subpoenas "prior to the hearing," which neither expressly nor implicity limits their availability to the General Counsel and specifically provides that they shall be available to "any party."

> after called the respondent, is asked to submit a statement of his position in respect to the allegations. The case is assigned to a member of the field staff for investigation, *who interviews representatives of the parties* and other persons who have knowledge as to the charges, as is deemed necessary. *In the investigation and in all other stages of the proceedings. . .* [T]he regional director may in his discretion dispense with any portion of the investigation described in this section as appears necessary to him in consideration of such factors as the amount of time necessary to complete a full investigation, *the nature of the proceeding*, and the public interest. After investigation, the case may be disposed of through informal methods such as withdrawal, dismissal, and settlement; or, the case may necessitate formal methods of disposition. Some of the informal methods of handling unfair labor practice cases will be stated first. (Emphasis added.) 29 C.F.R. §101.4

The term "proceedings" is also mentioned elsewhere in the Board's rules. Sections 102.73, 102.74 and 102.75 state in pertinent part:

> Sec. 102.73 *Initiation of proceedings* — Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of section 8(b)(7) of the act, the regional director shall investigate such charges, giving it the priority specified in subpart G of this part.
>
> Sec. 102.74 *Complaint and formal proceedings* — If it appears to the regional director that the charge has merit, formal *proceedings* in respect thereto shall be instituted in accordance with the procedures described in §§102.15 to 102.51, inclusive insofar as they are applicable . . . If it appears to the regional director that issuance of a complaint is not warranted, he shall decline to issue a complaint . . .

> Sec. 102.75 *Suspension of proceedings on the charge where timely petition is filed* — If it appears to the regional director that issuance of a complaint may be warranted but for the pendency of a petition under section 9(c) of the act, which has been filed by any proper party within a reasonable time not to exceed 30 days from the commencement of picketing, the regional director shall suspend proceedings on the charge and shall proceed to investigate the petition under the expedited procedure provided below, pursuant to the first proviso to subparagraph (C) of section 8(b)(7) of the act. (Emphasis added.)
>
> 29 C.F.R. §§102.73, 102.74 and 102.75

The term "proceedings" also appears elsewhere in the Board's rules and regulations in a manner that clearly states that issuance of a complaint or commencement of a hearing are not prerequisites for a Board "proceeding." See e.g., 29 C.F.R. §101.40 (Board advisory opinion procedure).

Several other Courts of Appeals have interpreted "proceedings" as including an investigation. *Rice v. U.S.*, 356 F.2d 709 (8th Cir. 1966); *U.S. v. Fruchtman*, 421 F.2d 1019 (6th Cir. 1970); *U.S. v. Vixie*, 532 F.2d 1277 (9th Cir. 1976). In these three cases, the courts were construing the meaning of "proceeding" in the context of 18 U.S.C. §1505, which outlaws conspiring to interfere with an agency proceeding. However, since the statute is designed to protect agency "proceedings," a "proceeding" within the meaning of 18 U.S.C. §1505 must at least implicitly also be a proceeding within the meaning of the particular *agency's* statutes or rules. Thus, the court in *Rice, supra*, which involved a Board *investigation* of an unfair labor practice charge, looked to the N.L.R.B.'s regulations, citing 29 C.F.R. §101.4, quoted above, and noted, "It is singular to note that the Labor

Board's regulations refer to its investigative aspects as being 'proceedings.' " 356 F.2d at 712, 713.

As the court in *Rice, supra*,noted, "[i]f the filing of the complaint initiates a proceeding in the court, then most certainly the filing of an unfair labor charge commences a proceeding before the Labor Board." 356 F.2d at 714. The investigatory stage of an unfair labor practice case is clearly analagous to the post-complaint stage of a civil case or the post-indictment phase of a criminal case, in terms of both the party-respondent's involvement in the proceedings and its need for access to information necessary to build a meaningful defense.

When a charge is received in the Board's regional office, it is filed, docketed and given a case number. A copy is served upon the party-respondent. The charging party submits supporting evidence; the party-respondent is asked to submit a statement of its position. During the investigatory stage and *prior* to issuance of any complaint, "the regional director affords an opportunity to all parties for the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment . . ." 29C.F.R. §§101.4, 101.7 (1980). See also *Rice v. U.S., supra,* 356 F.2d at 713.

Thus, a party-respondent's level of involvement in the investigatory stage of an unfair labor practice proceeding, and the importance of that involvement to the case's ultimate disposition, also mandate the conclusion that the investigation of an unfair labor practice charge is a "proceeding" and that the Hospital has a clear and certain right to the subpoenas it seeks.

In *Rice, supra,* the government argued, and the court agreed, that, under the Board's regulations, an investigation *was* a proceeding. The Court of Appeals for the Sixth Circuit approved the *Rice* court's reasoning in *U.S. v. Fruchtman, supra,* 421 F.2d at 1021, yet implicitly rejects it in the present case in holding that the Hospital lacks a clear and certain right to the subpoena it seeks.

The Court of Appeals' decision in the present case also augurs ill for the continued vitality of the interpretation of 18 U.S.C. §1505 announced in *Rice, supra,* and endorsed by the Sixth Circuit in *Fruchtman, supra*, since the *Rice* doctrine rests on an implicit finding that the agency action at issue is a "proceeding" within the meaning of the agency's statutes and regulations. The Court of Appeals' decision in Case No. 80-3118 thus presents to this Court a decision which is inconsistent with this Court's holding in *D.B. Lewis, supra,* and with the decisions of other Courts of Appeals.

2. THE AUTHORIZATION CARDS ARE NOT EXEMPT FROM MANDATORY DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT.

The FOIA exemptions in no way diminish the Hospital's right to examine authorization cards. In *N.L.R.B. v. Sears, Roebuck and Co.*, 421 U.S. 132 (1975), this Court set forth the philosophy of the FOIA:

> The Act (FOIA) seeks to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language . . . As the Act is structured, virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the Act's nine exceptions. 421 U.S. at 136.

Moreover, it is well established that, when implementing the FOIA, courts should broadly construe the obligation to produce and narrowly construe the exemptions contained in the FOIA. See e.g., *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1 (1974); *EPA v. Mink,* 410 U.S. 73 (1973); and *Ethyl Corp. v. EPA,* 478 F.2d 47 (4th Cir. 1974). An agency possessing information requested under the FOIA has the heavy burden of proving the specific applicability of the exemptions to the information. *EPA v. Mink, supra*. Thus, unless the Board establishes that the information

on the authorization cards requested under the FOIA is exempted, it must disclose this information to the Hospital.

2A. THE AUTHORIZATION CARDS ARE NOT EXEMPT FROM MANDATORY DISCLOSURE UNDER EXEMPTION 7(A) OF THE FREEDOM OF INFORMATION ACT.

Exemption 7(A) exempts from disclosure "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . interfere with enforcement proceedings." 5 U.S.C. §552(b) (7) (A). The Board claims that the authorization cards are exempt from mandatory disclosure under this exemption, and the Court of Appeals seemed to agree when it stated "authorization cards . . . are investigatory records in the possession of the Board for enforcement purposes." *N.L.R.B. v. Martins Ferry Hospital Association,* Case Nos. 79-3408-9 (6th Cir. 1981).

The Third Circuit, however, directly addressed and rejected the argument that Exemption 7(A) is available to the Board in factual settings similar to the instant situation. *Committee on Masonic Homes, etc. v. N.L.R.B.,* 556 F.2d 214, 218, 219 (3rd Cir. 1977). There, as here, the Board had not issued a complaint against the employer. The Court of Appeals expressly rejected the Board's argument that the authorization cards were compiled for a law enforcement purpose. *Committee on Masonic Homes, supra,* at 219. Furthermore, it should be noted that the other decisions which the court below cited have not held that Exemption 7(A) applies to authorization cards in the possession of the Board. Thus, the court below is the first Court of Appeals to hold that Exemption 7(A) applies in the instant fact situation.

The court below appears to have relied on *N.L.R.B. v. Robbins Tire and Rubber Co.,* 437 U.S. 214 (1978), and *N.L.R.B. v. Hardeman Garment Corp.*, 557 F.2d 559 (6th Cir. 1977), in deciding that Exemption 7(A) applies. This

reliance is misplaced inasmuch as the fact situations of these cases are distinguishable. In both *Robbins Tire, supra,* and *Hardeman Garment, supra,* the FOIA requests were for witness statements obtained by agents of the Board specifically for a Board proceeding, while the present case involves a request for authorization cards, which are commercial documents which were not even compiled by the Board and had no connection with any proceeding when they came into being.

The witness statement affidavits in *Robbins Tire* and *Hardeman Garment* were obtained by the General Counsel of the Board during an unfair labor practices investigation for the purpose of determining whether unfair labor practices had occurred. In contrast, the authorization cards sought here have no bearing on whether unfair labor practices occurred; the cards were not prepared primarily or even secondarily to prosecute law violators. Their only purpose was to determine whether a majority of employees designated at a certain time a labor organization as their bargaining agent. Thus, it is not at all surprising that in an analogous situation the court in *Committee on Masonic Homes, supra,* expressly rejected the Board's argument that Exemption 7(A) applied to authorization cards held by the Board for the purpose of determining whether a 30% level of support existed for a union.

The decision below also implies that if authorization cards are not discoverable under the rules of the Board, then discovery cannot be attained under the FOIA. This attempted application of *Robbins Tire* is in error. *Robbins Tire* does not permit the Board to thwart the FOIA by giving a blanket exemption to anything not discoverable under its rules. Instead, the rights under the FOIA of a party in a Board proceeding are not "in any way diminished by its being a private litigant." *Robbins Tire, supra* at 242, n. 23. This Court has stated that information should be disclosed unless it is "exempted under clearly delineated statutory authority." *Sears,*

supra at 136. Therefore, even information which is not discoverable under the rules of the Board must be disclosed under the FOIA unless specifically exempted therein.

The factors which led the Court to exempt the *Robbins Tire* affidavits from FOIA disclosure are not present in this case. Disclosing the authorization cards will not "interfere with enforcement proceedings," as required in Exemption 7(A), by increasing the risk that employers will coerce or intimidate their employees into changing their testimony. The Board has requested the W-4 forms so that handwriting experts can authenticate the card signatures. Employees will not be "chilled" from signing authorization cards, for the cards have already been signed, the election has been held, and the labor organization was defeated. Disclosing the authorization cards to the Hospital will not alter the outcome of these proceedings other than by giving the Hospital an equal opportunity to authenticate the cards and prepare its case as required under the tenets of due process.

Thus, the Court of Appeals misconstrued *Robbins Tire*. The Hospital submits that the authorization cards in question do not meet the investigatory record standard of Exemption 7(A) for the aforesaid reasons. The legislative history the Court relied upon in *Robbins Tire* dealt specifically with witness statements, see, e.g., 437 U.S. at 225; the applicability of that legislative history to authorization cards is unclear at best. Further, the Court in *Robbins Tire* recognized that it was dealing with "the narrow question whether witnesses' statements must be released five days prior to an unfair labor practice hearing," 437 U.S. at 242. The Court of Appeals decision would erroneously extend the cloak of *Robbins Tire* over virtually every form of document, regardless of circumstances of creation, which could ever conceivably figure in any Board proceeding of any kind. Authorization cards requested under the present facts should not be exempted from disclosure under the language of Exemption 7(A).

2B. THE AUTHORIZATION CARDS ARE NOT EXEMPT FROM MANDATORY DISCLOSURE UNDER EXEMPTION 6 OF THE FREEDOM OF INFORMATION ACT.

The court below relied partly on Exemption 6 of the FOIA, which exempts from mandatory disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." 5 U.S.C. §552(b) (6). Significantly, the Supreme Court has never delineated the scope of this exemption in the context of Board activities.

As discussed above, this Court has stated that the FOIA established a general philosophy that an agency's obligation of disclosure should be broadly construed, while the exemptions listed in the FOIA should be narrowly construed. *Renegotiation Board v. Bannercraft Clothing Co., supra; EPA v. Mink; supra.* Accordingly, given the statutory language and this Court's interpretation of the FOIA, union authorization cards should not be included under Exemption 6.

2(B)1. THE FREEDOM OF INFORMATION ACT IN NO WAY DIMINISHES THE HOSPITAL'S RIGHT TO "MIRROR IMAGE" INFORMATION, IN THAT THE AUTHORIZATION CARDS ARE NOT "SIMILAR FILES."

The Hospital and the Board each has half of the information needed to authenticate by expert handwriting comparison the signatures on the union authorization cards. Each seeks from the other the "mirror image" of the information it already possesses. The Board, however, is attempting to complete its data, while thwarting the Hospital's efforts to do likewise.

As the authorization cards are not personnel or

medical files, they must be "similar files" to qualify for Exemption 6. Yet these authorization cards are not similar to personnel or medical files; instead, they are commercial documents which labor organizations use to obtain representational status. Such cards are not even compiled by or obtained by an agency of the government but come entirely from third-party organizations. The cards do not contain the detailed personal information found in personnel or medical files. They generally contain only an employee's name, address, and employment status, information which the employer already has in his possession. At most, the cards reveal an expression of interest of an individual in entering into a commercial agreement, hardly the type of sensitive personal information found in personnel or medical files.

2(B)2. THE FREEDOM OF INFORMATION ACT IN NO WAY DIMINISHES THE HOSPITAL'S RIGHT TO "MIRROR IMAGE" INFORMATION IN THAT THERE IS NO CLEARLY UNWARRANTED INVASION OF PRIVACY.

Even assuming that the authorization cards are "similar files," their disclosure would not constitute a "clearly unwarranted invasion of personal privacy." Under this standard, courts should balance "the individual's right of privacy against the preservation of the basic purpose of the . . . Act 'to open agency action to the light of public scrutiny.' " *Department of the Air Force v. Rose*, 425 U.S. 352 at 372 (1976). "[T]he statutory language 'clearly unwarranted' instructs the court to tilt the balance in favor of disclosure." *Getman v. N.L.R.B.*, 450 F.2d 670 at 674 (D.C. Cir. 1971).

Labor organization authorization cards are commercial documents which are often disclosed to employers. Labor organizations as a matter of common practice let employers examine authorization cards as part of a "card check" to establish that a majority of employees wish to be represented by the labor organization. See, e.g.

Rockwell International Corporation, 220 N.L.R.B. No. 192 (1975). Likewise, the Board provides authorization cards to employers who allegedly "have made it impossible to hold a fair election and where a majority has signed authorization cards" pursuant to *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969). Thus, these cards are entirely different from the witness statements which concerned the Court in *Robbins Tire, supra*. The fact of the matter is that authorization cards are commercial documents used by labor organizations to obtain representation status, and correspondingly to obtain initiation fees and dues; they are not the "privileged" documents that the lower courts and the Board make them out to be.

The card signers have little privacy interest in not having the signatures disclosed. The disciplinary files of cadets which the Court held exempt from disclosure in *Department of the Air Force v. Rose, supra*, were of a personal nature and were not to be made public in the future. The authorization cards, however, are commercial documents which unions disclose to third parties and which the Board introduces as evidence in unfair labor practice hearings. Labor organizations and the Board do not recognize any "privacy interest" attaching to authorization cards. The Board picks and chooses when the so-called "personal privacy" shield is to be applied with respect to authorization cards. In reality it is the Board's "privacy" which it seeks to protect. The purpose of Exemption 6, however, is to protect the privacy interests of *individuals*. Yet there is nothing in the present record to suggest that such individuals wish to be protected or that the cards were furnished in confidentiality.

The public interest in disclosure weighs heavily in this case. The philosophy behind the FOIA is that disclosure of governmental information is in the public's interest. *Department of the Air Force v. Rose, supra*. This interest outweighs any privacy interests which the employees have in authorization cards, the contents of which the

Board plans to reveal in an unfair labor practice hearing. The Board's argument that disclosure at an administrative law judge hearing will be adequate to protect everyone's interests is flawed for two reasons. First, the main thrust of the FOIA is that disclosure is in the public interest; the exemptions from disclosure set forth in the FOIA do not exempt an agency from present disclosure because it intends to disclose the information in the future. Second, the Hospital has no guarantee that it will be given ample time to investigate the validity of the signatures if they are not revealed until an unfair labor practice hearing.

If the Court of Appeals decision is allowed to stand, the scope of Exemption 6 will be increased. Congress' intent in having broad governmental disclosure and narrow exemptions will be frustrated. The Court of Appeals has enlarged Exemption 6 beyond its literal meaning by loosely interpreting the phrase "similar files." Thus, the Court should review this case to determine whether Exemption 6 of the FOIA has been properly interpreted and applied or whether the public's interest in access to government information has been thwarted.

3. THE NATIONAL LABOR RELATIONS BOARD MUST COMPLY WITH DUE PROCESS.

The National Labor Relations Act, 29 U.S.C. §151, et seq., does not require the Board to follow the discovery procedures set forth in the Federal Rules of Civil Procedure, as there is no specific provision in the Act for discovery procedures. Nonetheless, it is well established that Board procedures and actions must comply with the due process clause of the Fifth Amendment. *International Telephone and Telegraph Corporation v. Local 134, International Brotherhood of Electrical Workers, AFL-CIO,* 419 U.S. 428 (1975). This point is made explicit in *N.L.R.B. v. Valley Mold Co., Inc.*, 530 F.2d 693, 695 (6th Cir. 1976), where it was stated that "it is the responsibility of the Board, so long as it conforms to

the requirements of due process, to formulate its own rules as to when discovery is available to a party." In this instance, the Board's actions and the Court of Appeals decision violate the due process rights of the Hospital.

The Board's discovery rules have been described as resulting in " 'trial by ambush' which, in the eyes of many, are outmoded and unfair." *New England Medical Center Hospital v. N.L.R.B.*, 548 F.2d 377, 387 (1st Cir. 1976).

This Court has never considered whether the Board's discovery procedures comply with the requirements of due process. In *Robbins Tire, supra*, the Court dealt with certain Board discovery rules in the context of a FOIA request but did not consider the due process aspect of these rules; instead, the Court noted "[w]hile those drafting discovery rules for the Board might determine that this 'interference' [i.e., prehearing disclosure of witness statements] is one that should be tolerated in order to promote a fairer decision-making process, that is not our task in construing FOIA." *Robbins Tire, supra*, at 242. The Court also noted the split of authority among the circuits as to when the Board should permit discovery, but did not have to resolve this conflict in *Robbins Tire, supra* at 237, fn. 16. Thus the effect of due process requirements on the Board's discovery procedures is an important issue which has not been, but should be settled by this Court.

3A. IF THE NATIONAL LABOR RELATIONS BOARD'S W-4 SUBPOENA IS ENFORCED, THEN THE BASIC TENETS OF DUE PROCESS MANDATE THAT THE HOSPITAL BE GIVEN ACCESS TO THE "MIRROR IMAGE" INFORMATION THAT IT SEEKS.

If verification of the authorization cards by a handwriting comparison is necessary at this stage of the Board proceeding, then the Board must do so within the tenets of procedural due process. Thus, if any party in the

Board's proceedings is allowed discovery, then procedural due process requires that it must be made available to all parties. If the Board is permitted to issue an enforcement order against the Hospital requiring it to comply with the Board's subpoena for the W-4 forms, then it must permit the Hospital the corresponding right to adequately prepare itself for trial by an examination of the "mirror image" evidence, i.e., the signatures on the authorization cards. If this examination is not permitted, the Hospital will be severely deprived of its Fifth Amendment due process rights. The Hospital objects to the Board's pre-complaint and pre-trial gathering of evidence, which Congress has not made mandatory in Board proceedings, under the guise of an investigation for the purpose of determining the remedy the Board will seek at trial while the Hospital is denied the opportunity to review the "mirror image" evidence.

3B. THE COURT OF APPEALS' DECISIONS SANCTION NATIONAL LABOR RELATIONS BOARD ACTIONS WHICH LACK THE FUNDAMENTAL FAIRNESS AND FAIR PLAY WHICH ARE THE ESSENCE OF DUE PROCESS.

As Mr. Justice Frankfurter noted in his concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 at 161 (1951), this Court has often stepped in to check "attempts of executives, legislatures, and lower courts to disregard the deep-rooted demands of fair play enshrined in the Constitution." Indeed, this Court and lower courts have recognized that fair play and fundamental fairness are the essence of due process. *Galvan v. Press*, 347 U.S. 522 at 530 (1954); *N.L.R.B. v. National Survey Service, Inc.*, 361 F.2d 199 at 208 (7th Cir. 1966). That the Board in its enforcement of the Act must stay within the bounds of "fundamental concepts of fair play and due process" has been recognized time and time again. *N.L.R.B. v. Welcome-American Fertilizer Company*, 443 F.2d 19 at 20 (9th Cir. 1971). See also *Great*

Lakes Screw Corporation v. N.L.R.B., 409 F.2d 375 at 378 (7th Cir. 1969); *Alaska Roughnecks and Drillers Association v. N.L.R.B.*, 555 F.2d 732 at 735 (9th Cir. 1977).

Yet the decisions of the Court of Appeals in the cases now before this Court give the blessing of the judiciary to Board actions which can scarcely be said to embody "that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization." *Joint Anti-Fascist Refugee Committee v. McGrath, supra*, at 162. If the Court of Appeals' decisions stand, the Board will be free to engage in the equivalent of *pre-trial discovery* with respect to one of several possible *remedies*, without issuing a complaint and without affording the Hospital a similar opportunity to prepare a meaningful defense.

The Board has sought to obscure the essential inequity of its actions by appeals to §11(1) of the Act and Exemptions 6 and 7(A) of the FOIA. Neither of these statutes, however, can serve the Board as a shield against redress of the manifest unfairness of its actions. The only straightforward, internally consistent construction of §11(1) of the Act demands the conclusion that the Hospital, as a party to a proceeding, has a clear and certain right to the issuance of the subpoenas. Likewise, only a strained and unnatural interpretation of the FOIA exemptions at issue here can protect union authorization cards from disclosure. No court should be quick to conclude that either the Act or the FOIA was ever intended to lend a veneer of legitimacy to the one-sided and self-serving Board actions which form the basis of these cases.

The Hospital seeks no advantage; it merely seeks the fair play which the Act, the FOIA and due process require. It is immaterial to the Hospital whether each party receives from the other the requested information now, or whether each party receives the information during the unfair labor practice hearing. If the Board

believes that the Hospital would have ample time during the hearing to authenticate the signatures then the Board can likewise properly authenticate the cards at that time. The Board cannot fairly contend, however, that it could not authenticate the cards at that time but that the Hospital can. The rights of all parties might best be protected by the Board's subpoena being limited to the W-4 forms of those authorization cards it cannot otherwise validate and the Hospital's FOIA request and subpoena being limited to the same unvalidated authorization cards. And, if the Board wishes to obtain W-4's of the hospital employees it should be prepared to exchange the authorization cards it has in its possession — this can be done practically by both parties by exchanging this data *in camera* under the direction of a protective order if the Board is truly concerned about privacy interests. If the Board is not prepared to do this, it should drop its subpoena, and the Hospital will correspondingly drop its FOIA request. Thus, the Court should review the Court of Appeals' decisions to insure that the fairness essential to due process is maintained and to enforce the statutes' plain meaning which the Board has sought to obscure.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDIX A

Nos. 79-3408-09

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Plaintiff-Appellee,

v.

MARTINS FERRY HOSPITAL ASSOCIATION,
Defendant-Appellant.

MARTINS FERRY HOSPITAL ASSOCIATION,
Plaintiff-Appellant,

v.

NATIONAL LABOR RELATIONS BOARD,
Defendant-Appellee.

APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed May 27, 1981.

Before: LIVELY and MERRITT, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

PHILLIPS, Senior Circuit Judge. Case No. 79-3408 is before the court on the appeal of Martins Ferry Hospital Association of Martins Ferry, Ohio, (the Hospital) from the order of District Judge Robert M. Duncan, requiring the Hospital to obey a subpoena duces tecum issued by the Board. Judge Duncan directed the Hospital to turn over to the Board the

original or copies of IRS W-4 forms[1] of its employees, for use by the Board in connection with the General Counsel's investigation of Board Case No. 8-CA-10755. The stated purpose of the Board is to compare the signatures on the W-4 forms with purported signatures of employees on union membership authorization cards now in the Board's possession to determine whether a union is authorized to represent a majority of certain employees of the Hospital.

Case No. 79-3409 is before the court on the appeal from the summary judgment of District Judge Duncan refusing to order the Board to disclose to the Hospital the membership authorization cards purportedly signed by certain Hospital employees.

On September 25, 1979, this court entered a stay order in case No. 79-3408 and consolidated the two cases for hearing on appeal.

We affirm the decision of the district court in case No. 79-3409. We dissolve the September 25, 1979, stay order entered by this court in case No. 79-3408, modify the judgment of the district court in that case and affirm it as modified.

[1] The W-4 form in part is as follows:

Form **W-4** (Rev. October 1979)

Department of the Treasury—Internal Revenue Service

Employee's Withholding Allowance Certificate

Print your full name ▶ | Your social security number ▶

Address (including ZIP code) ▶

Marital status: ☐ Single ☐ Married ☐ Married, but withhold at higher Single rate

Note: If married, but legally separated, or spouse is a nonresident alien, check the single block.

1 Total number of allowances you are claiming (from line F of the worksheet on page 2) . . . . . .

2 Additional amount, if any, you want deducted from each pay (if your employer agrees) . . . . . $

3 I claim exemption from withholding because (see instructions and check boxes below that apply):

a ☐ Last year I did not owe any Federal income tax and had a right to a full refund of ALL income tax withheld, AND

b ☐ This year I do not expect to owe any Federal income tax and expect to have a right to a full refund of ALL income tax withheld. If both a and b apply, enter "EXEMPT" here . . . . . ▶

c If you entered "EXEMPT" on line 3b, are you a full-time student? . . . . . ☐ Yes ☐ No

Under the penalties of perjury, I certify that I am entitled to the number of withholding allowances claimed on this certificate, or if claiming exemption from withholding, that I am entitled to claim the exempt status.

Employee's signature ▶ Date ▶ , 19

Employer's name and address (including ZIP code) (FOR EMPLOYER'S USE ONLY) | Employer identification number

Detach along this line

I

On September 15, 1976, the Licensed Practical Nurse and Skilled Employees Professional and Economic Security Program, Inc. (LPN-SHEP), a labor organization, filed with the Board a petition requesting that an election be held among the Hospital's technical employees. LPN-SHEP claimed to represent at least 30 per cent of the technical employees. Authorization cards purportedly signed by employees designating LPN-SHEP as their collective bargaining representative were submitted to the Board.

Another labor organization, Local 1199, National Union of Hospital and Health Care Employees (Local 1199), also filed three petitions seeking representation of three separate units of the Hospital's employees. Two of these three petitions claimed that 30 per cent or more of the employees in the requested unit supported Local 1199 as their collective bargaining representative. The third petition averred that a substantial number of employees supported Local 1199. On September 30, 1976, LPN-SHEP, in connection with a third labor organization, intervened with respect to one of Local 1199's petitions.

The Regional Director ordered elections in the three voting units petitioned for by the labor organizations. On December 16, 1978, elections conducted by the Board were held at the Hospital. A majority of the eligible voters in each unit voted against representation by any labor organization. Local 1199 filed 27 objections to the election, alleging pre-election misconduct by the Hospital. On January 24, 1977, Local 1199 filed an unfair labor practice charge against the Hospital, averring various acts allegedly rendering a fair election impossible. Local 1199 also claimed that it represented a majority of the Hospital's employees, as demonstrated by signed authorization cards, and that the Hospital unlawfully refused to bargain with this Union. The Board was asked to issue an order requiring the Hospital to bargain with Local 1199 as the

exclusive representative of its employees in the respective units.

At the request of the General Counsel, the Board issued a subpoena duces tecum requiring the Hospital to produce IRS W-4 forms, or if such forms were unavailable, other documents bearing signatures of all employees in the involved units covering the period from June through October 1976. On June 1, 1978, the Board denied the Hospital's petition to revoke the subpoena, stating that the "information sought appear[ed] to be relevant to the matter under investigation." The Hospital refused to comply with the subpoena.

On August 1, 1978, the Board filed an application in the district court for an order requiring that the Hospital obey its subpoena duces tecum. The appeal from the decision of the district court granting the relief prayed by the Board is case No. 79-3408.

On June 5, 1978, the Hospital filed its complaint in the district court under the Freedom of Information Act praying an injunction requiring the Board to make available to the employer the membership authorization cards allegedly executed by its employees. The district court granted the Board's motion for summary judgment, holding that the membership application cards are exempt from the Freedom of Information Act. The appeal from this judgment is case No. 79-3409.

II

It is well settled that a subpoena issued by the Board pursuant to 29 U.S.C. § 161(1) should be enforced if "the matter under investigation is within the jurisdiction of the Board and . . . the evidence subpoened is related to that matter and is described with 'sufficient particularity'." *N.L.R.B.* v. *ITT Telecommunications*, 415 F.2d 768, 769 (6th Cir. 1969); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950). *See also Goodyear Tire and Rubber* v. *N.L.R.B.*, 122 F.2d

450 (6th Cir. 1941). This rule includes IRS W-4 forms signed by employees of a company against which a charge of unfair labor practice is pending before the Board. *N.L.R.B.* v. *Playskool, Inc.*, 431 F.2d 518, 519 (7th Cir. 1970).

Section 10057, N.L.R.B. Casehandling Manual (Part One), Unfair Labor Practice Proceedings, contains this statement of Board policy:

> *Authorization Cards: Establishing Authenticity*
>
> In all proceedings before the Board, the General Counsel offers only evidence which he has reason to believe is true and authentic. *It is mandatory upon Regions to establish the authenticy of authorization cards before issuance of complaint.* (Emphasis added.)

In his order requiring the Hospital to obey the subpoena duces tecum issued by the Board, District Judge Duncan emphasized that the Board is attempting to determine the asserted majority status of Union 1199 and needs to use IRS W-4 forms or other documents in the employer's possession bearing employee signatures in order to determine the validity of signatures on authorization cards. The Union is seeking a bargaining order pursuant to *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575, 614 (1969), which held that the Board may issue a bargaining order to remedy employer unfair labor practices which have undermined the majority strength of the Union to such an extent as to prevent the holding of a fair election "where there is a showing that at one point the union had a majority."

The Hospital contends that the subpoena unnecessarily interferes with the right of privacy of hospital employees. It is true that Form W-4 contains personal information concerning employees which could be of no interest to or concern of the Board, such as marital status, number of income tax allowances claimed, amount desired to be deducted each payday, exemptions from withholding claimed and the ground

for the exemptions. To avoid this disclosure of private information, this court modifies the order of the district court so as to permit the Hospital, in lieu of furnishing the original W-4 forms to the Board, at the option of the Hospital to provide legible copies of W-4 forms of its employees during the period specified in the subpoena, made by a coping machine, obliterating all information on the form except the full name and address, social security number and signature of the employee and the date the W-4 form was signed. With this modification, the judgment of the district court in case No. 79-3408 is affirmed.

III

The district court correctly held that the union authorization cards sought by the Hospital are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552. *N.L.R.B.* v. *Robbins Tire and Rubber Co.*, 437 U.S. 214 (1978); *Howard Johnson Co.* v. *N.L.R.B.*, 618 F.2d 1 (6th Cir. 1980); *Madeira Nursing Center, Inc.* v. *N.L.R.B.*, 615 F. 2d 728 (6th Cir. 1980); *N.L.R.B.* v. *Hardeman Garment Corp.*, 557 F.2d 559 (6th Cir. 1977). Authorization cards, like the witness statements in *Robbins Tire*, are investigatory records in the possession of the Board for enforcement purpose. Authorization cards are not discoverable by an employer under the rules of the Board, and discovery cannot be attained under the Freedom of Information Act.

The Hospital contends that the district court failed to protect the Hospital's fifth amendment right to substantive due process by permitting the Board to engage in pre-trial discovery while denying the Hospital equal discovery. We hold this contention to be without merit. *N.L.R.B.* v. *Valley Mold Co.*, 530 F.2d 693, 695 (6th Cir.), *cert. denied*, 429 U.S. 824 (1976).

If the current investigation conducted by the General Counsel should result in the filing of a complaint, the Hospital

will be entitled to a due process hearing, including an opportunity to compare signatures on authorization cards with signatures on the W-4 forms, and to introduce evidence in opposition to any effort on the part of the General Counsel to obtain a *Gissel* bargaining order. Any failure on the part of the Board to conduct a due process hearing can be challenged in proceedings before the Board and, if necessary, by petition to review filed in this court. *ITT* v. *Electrical Workers*, 419 U.S. 428, 448 (1975); *N.L.R.B.* v. *Valley Mold Co., Inc., supra*, 530 F.2d 693 (6th Cir.), *cert. denied*, 429 U.S. 824 (1976).

The judgment of the district court in case No. 79-3408 is modified as hereinabove set forth, and affirmed as modified. The judgment of the district court in case No. 79-3409 is affirmed. No costs are taxed. Each party will bear its own costs in this court.

No. 80-3118

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARTINS FERRY HOSPITAL ASSOCIATION, *Plaintiff-Appellant,* v. NATIONAL LABOR RELATIONS BOARD, JOHN FANNING, and BERNARD LEVINE, *Defendants-Appellees.*	ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed July 17, 1981.

Before: WEICK, KENNEDY, and MARTIN, Circuit Judges.

PER CURIAM. The sole issue in this case is whether section 11(1) of the National Labor Relations Act, 29 U.S.C. § 161 (1) requires the National Labor Relations Board to issue subpoenas to a requesting party during the investigative phase of an unfair labor practice proceeding.

Martins Ferry Hospital Association operates a hospital in Martins Ferry, Ohio. On December 16, 1976, the Board conducted elections in three voting units at the hospital. A majority of the eligible voters in each unit voted against any union representation. On January 24, 1977, one of the unions which lost the election filed an unfair labor practice charge, alleging that the Hospital violated sections 8(a)(1), (2), (3), and (5) of the Act. The union further alleged that it

represented a majority of the employees in the appropriate units, as evidenced by signed authorization cards.

The General Counsel began to investigate the charge, including the allegation of majority support. In order to authenticate the signatures on the authorization cards, the Board, at the General Counsel's request, issued to a field examiner a subpoena duces tecum directing the Hospital to produce IRS W-4 forms or other documents bearing employee signatures. This case involves the Hospital's request that the Board issue to it subpoenas comparable to the one issued to the Board's field examiner. The Hospital would like subpoenas directing the field examiner and the unions involved in the unfair labor practice proceedings to turn over the originals or true copies of all authorization cards signed by the Hospital's employees during the pre-election period under investigation. On July 25, 1978, the Acting Regional Director denied the request.

The Hospial subsequently filed this action in the District Court for mandamus relief under 28 U.S.C. § 1361, seeking an order compelling the Board to issue the subpoenas requested by the Hospital. The District Court concluded that the Hospital failed to prove that the Board had a clearly established and plainly defined duty to issue the subpoenas. The Court noted that the Board had a mandatory duty under section 11(1) to issue subpoenas upon application of "any party to such proceedings." However, it determined that the Board's interpretation of the provision – that "proceedings" begin only after the Board has issued a complaint in the case – is not clearly wrong. Because the duty alleged by the plaintiff is not indisputable and peremptory, and because the court's mandamus jurisdiction under 28 U.S.C. § 1361 is contingent upon a proper showing of a right to relief, the District Court dismissed the case with prejudice.

We affirm. As pointed out by the District Court, this court has outlined the scope of traditional mandamus relief: "Be-

fore petitioner may resort to the extratordinary writ of mandamus, he must establish that he has a clear and certain right and that the duties of the respondent are ministerial, plainly defined and peremptory." *United States* v. *Battisti*, 486 F.2d 961, 964 (6th Cir. 1973), citing *Albert* v. *United States District Court for Western District of Michigan*, 283 F.2d 61, 62 (6th Cir. 1960). We agree that the word "proceeding" in section 11(1) is not without ambiguity, and that the duty which the Hospital contends is imposed by section 11(1) is not so clearly established that the Hospial is entitled to mandamus relief.

Accordingly, the judgment of the District Court is affirmed.

APPENDIX B

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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Martins Ferry Hospital Association,	:	
Plaintiff	:	
v.	:	Case No. C-2-79-826
National Labor Relations Board, et al.,	:	
Defendants	:	

MEMORANDUM AND ORDER

This is one of a handful of cases arising out of a labor representation election dispute at the Martins Ferry Hospital in 1976. Upon losing the election, a union filed charges with the National Labor Relations Board (NLRB) alleging that plaintiff committed unfair labor practices that destroyed the union's card-based majority status. In order to confirm the union's majority status, it is necessary to conduct a comparison of the signatures on the union authorization cards with the employees' signatures. To make this comparison, the Board subpoenaed W-4 forms for plaintiff's employees. By an order dated February 5, 1979, in a related case, this Court ordered plaintiff to obey the subpoena and rejected a challenge that the W-4's were privileged from disclosure for these purposes. Martins Ferry Hospital Association v. NLRB, Case No. C-2-78-529 (Feb. 5, 1979).

The Court also held that the Freedom of Information Act (FOIA) prohibited plaintiff from obtaining authorization cards held by the NLRB. This lawsuit represents another attempt by the employer to get information which would enable it to conduct its own handwriting comparison.

Unable to obtain this information from the government, plaintiff requested the NLRB to issue subpoenas to three labor unions and an individual, Ms. Joan L. Kalhorn, for

the production of originals or copies of authorization cards signed by plaintiff's employees during the relevant period. The NLRB, by letter dated July 25, 1978, refused to issue the requested subpoenas and by telegram dated August 28, 1978, denied plaintiff's request to appeal the letter ruling. Plaintiff alleges that this evidence does not appear to have been solicited or considered by the NLRB in its investigation of the charges and may effectively rebut an alleged card-based majority in the union. It therefore asserts that the NLRB has a non-discretionary duty to issue the subpoenas under §11(1) of the National Labor Relations Act (hereafter "the Act"), 29 U.S.C. §161(1). Accordingly, plaintiff has filed this lawsuit predicating jurisdiction on 28 U.S.C. §1361, seeking an order in the nature of mandamus compelling the NLRB to issue the subpoenas.

This matter came on for hearing on plaintiff's motion for a preliminary injunction granting the relief sought. Since that time, defendant has moved for summary judgment, and that motion has now become ripe for decision as well. On the basis of the briefs of the parties,[1] the arguments at the hearing, and the evidence submitted to the Court, I conclude there are no genuine issues of material fact remaining on the record, and I accordingly make the following findings and conclusions on the merits as required by Fed. R. Civ. P. 52(a) and 56.

It is important preliminarily to note what this case is not about. First, this is not a case seeking judicial review of NLRB proceedings. At one point the NLRB did notify the plaintiff that the Board's telegraphic order refusing to issue the subpoenas was a final order which plaintiff was free to pursue in court. However, when the plaintiff attempted to seek judicial review of the "order" in the circuit court of appeals, the NLRB argued and that court found, that the order was not final within the meaning of 29 U.S.C. §160(f) and it therefore was without jurisdiction to hear plaintiff's petition. Martins Ferry Hospital Assn. v. NLRB, Case No.

78-1172 (6th Cir. Aug. 8, 1979).

Accordingly, §10(f) of the Act, 29 U.S.C. §160(f), providing for exclusive review of NLRB orders in the circuit court of appeals does not deprive this Court of jurisdiction.

Nor, with one exception, does this case concern matters in the hands of a government agency. Joan L. Kalhorn is the investigating agent for the NLRB. Any subpoenaed documents in her possession pursuant to her official capacity would presumably be protected by this Court's earlier order in Case No. C-2-78-529. With respect to the three subpoenas which plaintiff seeks to have issued to unions, however, the government clearly has no standing to raise FOIA exemption arguments. Plaintiff has made clear that it seeks only documents in the possession of the unions. Therefore, the Freedom of Information Act is not at issue here. See Chrysler Corp. v. Brown, 47 U.S.L.W. 4437, 60 L.Ed.2d 208, 219-20 (1979).

Finally, for clarity it should be pointed out that this case does not present the issue whether, for the purposes of exercising jurisdiction under 28 U.S.C. §1337, the Board's action was "in excess of its delegated powers and contrary to a specific prohibition of the Act." Leedom v. Kyne, 358 U.S. 184 (1958). That case recognized the power of district courts to remedy Board action where the Board violates a "clear and mandatory" duty. Nonetheless, although plaintiff does not assert jurisdiction under 28 U.S.C. §1337, the tests for this Court's jurisdiction, as discussed below, are very similar.

This case is brought pursuant to 28 U.S.C. §1361. This Court has jurisdiction under that provision to determine whether a duty is owed the plaintiff by the defendant and if so, to order the defendant to comply.

The issue in this case is whether the NLRB has violated a mandatory duty to issue the subpoenas requested by plaintiff. Plaintiff states that such a duty is stated in §11(1) of the Act, which provides in relevant part:

> For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title--
>
> (1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application.

In construing this provision to determine whether it imposes the kind of duty the performance of which may be compelled under 28 U.S.C. §1361, the Court must apply a standard not unlike that prescribed in Leedom v. Kyne for review pursuant to 28 U.S.C. §1337.

It is generally accepted that §1361 neither broadens nor limits traditional mandamus relief, but merely extends venue to all district courts. Hence, the court is to be guided by common law mandamus principles when applying this section. Davis v. Shultz, 453 F.2d 497, 502 (3d Cir. 1971); Carter v. Seamans, 411 F.2d 767, 773 n.11 (5th Cir. 1969), cert. denied, 397 U.S. 941 (1970); Loveladies Property Owners Assn., Inc. v. Raab, 430 F. Supp. 276, 282 (D. N.J. 1975), aff'd., 547 F.2d 1162 (3d Cir. 1976); Nixon v. Hampton, 400 F. Supp. 881, 885 (E.D. Pa. 1975); City of Highland Park v. Train, 374 F. Supp. 758 (N.D. Ill. 1974), aff'd., 519 F.2d 681, 691 n.8 (7th Cir. 1975), cert. denied, 424 U.S. 927 (1976).

The scope of traditional mandamus relief has been clearly stated by the Court of Appeals for this Circuit:

> Before petitioner may resort to the extraordinary writ of mandamus, he must establish that he has a clear

> and certain right and that the duties of the respondent are ministerial, plainly defined and peremptory.

United States v. Battisti, 486 F.2d 961 (6th Cir. 1973), citing Albert v. U. S. District Ct. for Western District of Michigan, 283 F.2d 61, 62 (6th Cir. 1960).

Not only is it necessary that a duty is owed to the plaintiff to give this Court jurisdiction but also the duty itself must be clearly established and plainly defined and the obligation to act must be peremptory. King v. Morton, 520 F.2d 1140, 1146 (D.C. Cir. 1975).

In this case there is no question that the duty to issue the subpoenas, under the appropriate circumstances, is mandatory and ministerial. Construing this section, the United States Supreme Court has stated, "The Act makes clear that the issuance of subpoenas is mandatory . . . . Upon application of a proper party the subordinate official automatically issues the subpoena to the applicant. There is involved no delegation of any act entailing the exercise of discretion. The agents issuing the subpoenas perform ministerial acts only." Lewis v. Labor Board, 357 U.S. 10, 14-15 (1958).

Thus, it is settled that the NLRB has a mandatory duty which is triggered by "application of any party to such proceedings." The focus of the parties' dispute is the question: when can it be said that an application is made by a party to the proceedings such that the Board's duty is triggered?

The Board has made its own interpretation of §11(1) and has issued regulations pursuant to this interpretation. According to the Board, a party may obtain a subpoena only after the Board has issued a complaint in a case--only then are there "proceedings" to which the applicant can be a party. After the filing of a charge but prior to the issuance of a complaint, there exists only an "investigation" conducted by the Board to determine whether a complaint should issue. Before it makes this determination, only the Board itself has authority

to issue subpoenas pursuant to its general grant of authority as the exclusive body empowered to investigate and remedy unfair labor practices. 29 U.S.C. §153.

Notwithstanding the Board's interpretation, plaintiff argues that the plain language of the statute does not support such a construction but rather that it clearly requires the subpoena to issue at any time during the investigatory as well as hearing phases of unfair labor practice proceedings.

At first blush, the plaintiff's interpretation carries much force. As plaintiff points out, the statute provides in its preamble that it applies for the purpose of "all hearings and investigations." The Board's mandatory duty is triggered by the application of "any party to such proceedings." The effect of the inherently reflexive word "such" may reasonably be read to make the meaning of "proceedings" dependent upon a prior concept to which it refers, in this case "all hearings and investigations" to which the section is made applicable by the preamble.

Further, the statute provides for the revocation of a subpoena, once issued, if the Board, in the exercise of its discretion, finds that certain conditions are met:

> Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with particularity the evidence whose production is required.

The provision that a subpoena may be revoked if it pertains to evidence which "does not relate to any matter under investigation" tends to support plaintiff's reading as does the language at the end of the first paragraph referring disjunctively to "evidence in such proceeding or investigation."

Plaintiff's interpretation, on the face of the statute, is plausible and even persuasive.

Nonetheless, I am unable to conclude that the plaintiff's reading is so certain as to permit this Court to exercise its jurisdiction under the mandamus statute.

Although the bare text of the statute tends to favor the plaintiff's interpretation, the use of the word "proceeding" in different meanings contributes to some ambiguity in the meaning of the statute; as this Court has noted before, the apparent plain meaning of a statute may yield to ambiguity when viewed in context. In this case, the ostensibly plain meaning of the statute is drawn into question by the policies and practices of the Board itself.

It has been observed that one of the limitations on a court's mandamus power is that "when performance of an official duty requires an interpretation of the law which governs that performance, the interpretation placed by the officer on the law will not be interfered with, certainly, unless it is clearly wrong and the official action arbitrary and capricious." Hammond v. Hull, 131 F.2d 23, 25 (D.C. Cir. 1942), cert. denied, 318 U.S. 777 (1943); Hanecke v. Secretary of Health, Education & Welfare, 535 F.2d 1291, 1296 (D.C. Cir. 1976). While this does not necessarily mean that the need for a court to construe the statutory provision which forms the basis of the action is a bar to the remedy of mandamus, Hanecke, supra, at 1296-97 n.16, it does prompt this Court to look for highly compelling reasons why the agency's interpretation is plainly wrong. I do not find them here.

The Board's interpretation is in line with its long-standing practice of limiting discovery in pre-hearing phases of labor investigations. This practice has, in another context, received the blessing of the Supreme Court. In NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978), the Court examined the question whether witness statements that the Board intended to use in unfair labor practice proceedings were subject to

disclosure to the charged party under the FOIA. Much of the Court's opinion deals with interpretation of the FOIA and Congress' intentions concerning §7(A), permitting non-disclosure of material tending "to interfere with enforcement proceedings." In order to determine whether the disclosure of potential witnesses' statements prior to hearing would interfere with enforcement proceedings in an unfair labor practice case, the Court examined the historical practices of the NLRB with regard to discovery. It stated:

> Historically, the NLRB has provided little prehearing discovery in unfair labor practice proceedings and has relied principally on statements such as those sought here to prove its case. While the NLRB's discovery policy has been criticized, the Board's position that §6 of the NLRA, 29 U.S.C. §156, commits the formulation of discovery practice to its discretion has generally been sustained by the lower courts. A profound alteration in the Board's trial strategy in unfair labor practice cases would thus be effectuated if the Board were required, in every case in which witnesses' statements were sought under FOIA prior to an unfair labor practice proceeding, to make a particularized showing that release of these statements would interfere with the proceeding.

The Court expressed concern that this would not only change the substantive discovery rules, but that the resulting trial of FOIA cases would likely cause substantial delays in the adjudication of unfair labor practice charges and that these delays would adversely affect the Board's ability to carry out its duty to investigate and prosecute violations of the labor laws. Robbins Tire, supra, at 238. The Court concluded that "Our reluctance to override a long tradition of agency discovery, based on nothing more than an amendment to a statute designed to deal with a wholly different problem, is strengthened by our conclusion that the dangers posed by premature release of the statements sought here would involve precisely the kind

of interference with enforcement proceedings that [§7(A) of the FOIA] was designed to avoid."

Some of the concerns expressed by the Supreme Court in Robbins Tire and recognized by this Court's earlier ruling on the FOIA--for example, delays caused by immediate interlocutory appeal of FOIA issues--are not pertinent here. Moreover, it should be stressed that the Robbins Tire decision, resting as it does almost wholly upon the Court's interpretation of congressional intention regarding the Freedom of Information Act, does not control this case. Nonetheless, the Court's discussion of NLRA policy and the practice of the Board with respect to prehearing discovery lends sufficient support for the Board's interpretation of the statute that it effectively renders any "duty" the Board may have to act differently too ambiguous and uncertain to warrant mandamus relief here. See Mayfield Dairy Farms, Inc. v. NLRB, Civil Action No. C79-21A (N.D. Ga. Jan. 19, 1979, slip op. 4, 6-7) in which the court determined that two possible interpretations of §11(1) prevented its finding that the NLRB's refusal to issue an "investigative subpoena" so "manifest" a violation of the statute as to warrant invocation of the court's equity powers under 28 U.S.C. §1337. See also City of Milwaukee v. Saxbe, 546 F.2d 693, 701 (7th Cir. 1976); McGaw v. Farrow, 472 F.3d 952 (4th Cir. 1973).

Finding as I do, that the Board's interpretation of §11(1) and resulting practice are not clearly wrong, and that the duty alleged by the plaintiff is not indisputable and peremptory, I accordingly conclude that the plaintiff is not entitled to relief pursuant to 28 U.S.C. §1361. This Court's jurisdiction being apparently contingent upon a proper showing of a right to relief under that section,[2] this case is hereby DISMISSED with prejudice.

It is so ORDERED.

Robert M. Duncan, Judge
United States District Court

[1]In addition, plaintiff has filed a motion to strike defendant's post-hearing brief or motion for leave to reply out of time. Defendant has filed a "motion for leave to file a motion for an extension of time to file a post-hearing brief." In the interest of rendering as fully-informed a decision as possible, the plaintiff's motion to strike will be DENIED, the plaintiff's motion for leave to reply and the defendant's motion for leave are GRANTED. The Court has considered both the plaintiff's memorandum submitted November 14, 1979, and the defendant's "post-hearing brief" filed November 5, 1979, in ruling on this case.

[2]While difficulties with this approach as a matter of logical and practical application are obvious, the proposition that the court's jurisdiction hinges upon a proper statement of a claim under traditional mandamus principles appears to be the law. Cook v. Arentzen, 582 F.2d 870 (4th Cir. 1978); City of Milwaukee v. Saxbe, 546 F.2d 693, 700 (7th Cir. 1976); National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Martins Ferry Hospital Association,

Plaintiff

v.

National Labor Relations Board, et al.,

Defendants

Case No. C-2-78-529

MEMORANDUM AND ORDER

This case arose from existing difficulties between the Martins Ferry Hospital Association (the Association) and the defendants, National Labor Relations Board (the Board), and Bernard Levine, Regional Director, Region Eight, National Labor Relations Board (the Regional Director).

I

On September 15, 1976, the Licensed Practical Nurse and Skilled Hospital Employees Professional and Economic Security Program, Inc., successor of and affiliated with Licensed Practical Nurse Association of Ohio, Inc. (LPN-SHEP) filed a petition with the Board requesting that an election be held among the hospital association's technical employees, claiming that the petition was supported by at least 30% of the employees. Also submitted were authorization cards allegedly signed by certain employees designating LPN-SHEP as their collective bargaining representative.

The National Union of Hospital and Health Care Employees, 1199, West Virginia, RWDSU, AFL-CIO (Local 1199) intervened in the above-mentioned petition. It filed three petitions seeking representation elections among the Association's technical employees, office clerical employees, and

service and maintenance employees. Each of Local 1199's petitions generally allege that a substantial number of employees wish to be represented and that each petition, except one, was supported by 30% or more of the employees in the requested unit.

On September 30, 1976, LPN-SNEP, jointly with Service, Hospital, Nursing Home and Public Employees Union Local No. 47, affiliated with the Service Employees International Union (SEIU) intervened in Local 1199's service and maintenance unit petition. After a hearing, the Regional Director on November 17, 1976, issued a Direction of Election in the voting units petitioned for by the labor organizations.

On December 16, 1976, a Board-conducted election was held at the hospital. A majority of the eligible voters in each unit voted against representation by any labor organization. Following the election, Local 1199 filed 27 alleged objections to the Association's pre-election conduct.

Since January 1977, Region 8 has been in the process of investigating Local 1199's charges. Letters and questionnaires have been sent to Association employees, telephone calls have been made, and personal contacts have been made by employees of Region 8.

The Association claims that "Region 8 has stated that it intended to file a complaint against the Association seeking an order requiring it to bargain with Local 1199 for service, maintenance, technical, and business office clerical units notwithstanding the election results." Region 8 has attempted to subpoena Internal Revenue Service forms W-4 in the possession of the Association for all of its employees.

II

Plaintiff's complaint alleges that in accordance with the Freedom of Information Act, 5 U.S.C. §552 (1977) the Association is entitled to have copies of certain "executed

membership-authorization cards" in the possession of the defendants made available to it. Plaintiff also requests that defendants be ordered to make available to it a copy of a "certain memorandum from defendant Board's Division of Advice," again claiming entitlement under 5 U.S.C. §552. The defendants have refused to allow plaintiff's requests for this information. The defendants have moved for summary judgment on the following grounds:

1. That there are no genuine issues of fact involved in this proceeding; and

2. That defendants are entitled to judgment as a matter of law on plaintiff's requests for injunctive relief, since the documents which plaintiff seeks are exempt from disclosure under 5 U.S.C. §552(b)(5), (6) and 7(A), (C), and (D) of the Freedom of Information Act.

The motion for summary judgment is pending, plaintiff having responded by memorandum contra with exhibits attached. Although the plaintiff urges the Court otherwise, I believe the material facts are not in genuine dispute; therefore, the issues raised by plaintiff's complaint are amenable to disposition by summary judgment.

FOIA as enacted in 1966 contained an exemption for "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 5 U.S.C. §522(b)(7). In 1974 the Congress amended this section in response to a number of court decisions which had construed the exemption so broadly that the records subject to disclosure were few. The amendment to Exemption 7 is as follows:

> investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings . . . (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source . . . .

The impact of this 1974 amendment was the subject of the Supreme Court's decision in National Labor Relations Board v. Robbins Tin and Rubber Company, ____ U.S. ____, 46 U.S.L.W. 4689 (June 15, 1978). It is helpful to the analysis of the issue presented in this case to set forth a number of the Supreme Court's conclusions in Robbins. In that case, after the NLRB filed an unfair labor practice complaint against the respondent employer, the respondent requested pursuant to FOIA, that the NLRB make available prior to hearing copies of all potential witnesses' statements collected during the NLRB's investigation. Relying on Exemption 7(A) of FOIA the Board denied respondent's request. The Supreme Court upheld the denial under Exemption 7(A). In Robbins Mr. Justice Marshall writes:

> In light of this history, the Government is clearly correct that the 1966 Act was expressly intended to protect against the mandatory disclosure through FOIA of witnesses' statements prior to an unfair labor practice proceeding.
>
> . . .
>
> While the Court of Appeals was correct that the Amendment of Exemption 7 was designed to eliminate "blanket exemptions" for Government records simply because they were found in investigatory files compiled for law enforcement purposes, we think it erred in concluding that no generic determinations of likely interference can ever be made. We conclude that Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally "interfere with enforcement proceedings."
>
> . . .
>
> Although reasonable arguments can be made on both sides of this issue, for the reasons that follow we conclude that witness statements in pending unfair labor

> practice proceedings are exempt from FOIA disclosure at least until completion of the Board's hearing.

46 U.S.L.W. at 4693, 4695.

The Court specifically recognized and approved the fact that historically the NLRB has provided little prehearing discovery in unfair labor practice proceedings. That Court remarked:

> While the NLRB's discovery policy has been criticized, the Board's position that §6 of the NLRA, 29 U.S.C. §156, commits the formulation of discovery practice to its discretion has generally been sustained by the lower courts. A profound alteration in the Board's trial strategy in unfair labor practice cases would thus be effectuated if the Board were required, in every case in which witnesses' statements were sought under FOIA prior to an unfair labor practice proceeding, to make a particularized showing that release of these statements would interfere with the proceeding.

46 U.S.L.W. at 4695-96. As a result the Court left intact the NLRB's discovery philosophy suggesting that an alternative result has the result of causing delay in NLRB proceedings when dispatch is desirable.

I also note that in Robbins the litigation involved discovery concerning a pending unfair labor practice proceeding which the Court viewed as within the meaning of the Exemption 7(A) language, "interference with enforcement proceedings." The Court pointed out that "the most obvious risk of 'interference' with enforcement proceedings in this context is that employers or, in some cases, unions will coerce or intimidate employees and others, who have given statements, in an effort to make them change their testimony or not testify at all." Robbins, supra, at 4696.

The Robbins opinion further comments of the evil the prophylactic rule is designed to cure:

> The danger of witness intimidation is particularly acute with respect to current employees--whether rank and file, supervisory, or managerial--over whom the employer, by virtue of the employment relationship, may exercise intense leverage. Not only can the employer fire the employee, but job assignments can be switched, hours can be adjusted, wage and salary increases held up and other more subtle forms of influence exerted. A union can often exercise similar authority over its members and officers. As the lower courts have recognized, due to the "peculiar character of labor litigation [,] the witnesses are especially likely to be inhibited by fear of the employer's or--in some cases--the union's capacity for reprisal and harrassment." Roger J. Au & Son, Inc. v. NLRB, 538 F.2d 80, 83 (CA3 1976). Accord, NLRB v. Harderman Garment Corp., 557 F.2d 559 (CA6 1977). While the risk of intimidation (at least from employers) may be somewhat diminished with regard to statements that are favorable to the employer, those known to have already given favorable statements are then subject to pressure to give even more favorable testimony.

Robbins, supra, at 4696.

Prehearing disclosure of witnesses' statements would involve the kind of harm that Congress believed would constitute an "interference with NLRB enforcement proceedings." Robbins, supra, at 4697.

Before concluding this discussion of the holding in Robbins, comment is directed to Mr. Justice Powell's concurrence in part and dissent in part. Differing from the majority, Mr. Justice Powell would construe Exemption 7(A) more narrowly and look to the potential for harm that the contested disclosure would affect. Speaking of the potential harm he perceives, he notes:

> Moreover, as the Court notes, many employees, mindful of the Board's prehearing settlement practice, may be willing to cooperate with

> the Board because they know that their identity will not be revealed and they will not be called to give public testimony adverse to their employer's interest unless such a course is absolutely necessary.

Robbins, supra, at 4699 (Powell, J., concurring in part and dissenting in part). (Emphasis added.)

Clearly, in Robbins it was the statements of witnesses that was sought, while here the Association seeks to examine the employees' executed authorization cards. Whether this factual distinction is sufficiently great to render the reasoning of the Supreme Court in Robbins inapplicable to this case is an issue raised by the plaintiff.

Plaintiff argues (1) that the authorization cards are not investigatory records and (2) that the cards were not received by defendants "for law enforcement purposes." Since the cards were not executed or received as a part of an investigation, plaintiff urges that they are, therefore, not investigatory records compiled for law enforcement purposes. While it is true the cards were initially executed and forwarded to the Board for a purpose then only, at best, indirectly related to law enforcement, circumstance can operate to make the cards relevant to a subsequent enforcement endeavor. In the instant case it is clear that the cards are important to the defendants' investigation into whether there has been an unfair labor practice. Determining such an issue is entirely consistent with the defendants' obligation to enforce the National Labor Relations Act.

In order to determine whether the information on the cards, which are not statements, should be entitled to a 7(A) exemption, it is necessary to consider the evil to be worked. As the Supreme Court in Robbins indicated, the harm the exemption was intended to avoid in the context of unfair labor practice proceedings was employee retaliation or subjection

of an employee to an unfavorable employment position because of the employee's manifested interest in having a union as his or her representative. Disclosure to an employer of the identity of an employee as a union proponent gives rise to the same kind of potential for harm as does disclosure to an employer that an employee has given the Board a statement that may be against the employer's position. The need for a prophylactic shelter for the identity of an employee who has signed an authorization card is the same or similar to the rationale for the protection of the witnesses' statements in Robbins. Disclosing the identity of those signing cards would have the potential to chill the desire for signing as a union supporter.

While this result is inapposite with discovery under the Federal Rules of Civil Procedure, it is consonant with the tradition of the Board, which now clearly has Supreme Court acceptance. Moreover, as mentioned hereinabove, Mr. Justice Powell in Robbins specifically mentioned the problem of disclosure of an employee's identity. I believe that the authorization cards are exempt from disclosure pursuant to Exemption 7(A).

III

The Board and Regional Director also rely on FOIA Exemption 6, which excludes from disclosure personnel and medical files and similar files the disclosure of which constitute a clearly unwarranted invasion of personal privacy. Utilization of Exemption 6 requires the delicate balancing of interests: the seriousness of the invasion and the benefit of disclosure.

In Committee on Masonic Homes, etc. v. NLRB, 556 F.2d 214 (3d Cir. 1977) the Court of Appeals for the Third Circuit had before it the question of FOIA exemptions where an employer sought to obtain copies of individual union cards that were submitted to the Board in support of a petition by the union for a representative. Unlike the result I reach, the Third

Circuit held that there was no exemption under 7(A), but the cards were exempt from disclosure under Exemption 6. Recognizing and affording the presumption in favor of disclosure, the Court in Masonic Homes held that the authorization cards were "similar" to personnel and medical files. The harm resulting from disclosure is described as follows at page 221:

> For instance, it is entirely plausible that employees would be "chilled" when asked to sign a union card if they knew the employer could see who signed. If so, this is a harm that could not easily be corrected. To order disclosure here would effectively do away with union cards as they are used now. We need only consider whether employees would be as likely to sign a prominently displayed notice at work, "Sign up for the union here. Organise for better working conditions and higher wages." Solicitation of authorization cards plays a vital role in organizational campaigns, and we cannot envision a workable substitute.
>
> Furthermore, union elections must be conducted by secret ballot. Whatever reasons and policies lie behind that would be directly undercut by forcing employees to acknowledge in public their support of the union, in order to be given the right to vote in secret for the union.

Likewise, I believe cards are entitled to an exemption under 6 for the same basic reason expressed in Masonic Homes.

In view of the above conclusions, there is no need to examine any of the other contentions regarding FOIA and the authorization cards.

IV

The defendants argue that the Advice memorandum which plaintiff seeks to examine is an inter-agency or intra-agency memorandum or letter not available to plaintiff in accordance with FOIA Exemption 5. The Court agrees with defendants in this regard. The memorandum was prepared to set

forth the General Counsel's strategy in putative litigation before the Board. This Court believes that NLRB v. Sears Roebuck & Co., 421 U.S. 151 (1975) is pertinent precedent for non-disclosure of the Advice memorandum.

In Case No. C-2-78-529 the Court holds that defendants' motion for summary judgment is well taken and is GRANTED.

Robert M. Duncan, Judge
United States District Court

FEB 5 2 23 PM '79

U.S. DIST. COURT
SOUTHERN DIST. OHIO
EAST. DIV. COLUMBUS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

National Labor Relations Board, :

Applicant :

v. :

Martins Ferry Hospital Association, :

Respondent :

Case No. C-2-78-785

ORDER

The National Labor Relations Board has applied for an order requiring the Martins Ferry Hospital Association to obey a Board-issued subpoena duces tecum issued by the Board in Board Case No. 8-CA-10755. The Court has considered the motion to stay proceedings filed by the Association and finds it not well taken, and it is DENIED. Attention is called to the basic dispute between the Association and the Board and the Regional Director as set forth in the Court's ruling on a motion for summary judgment in Case No. C-2-78-529.

As a part of the pending administrative proceeding the Board is attempting to determine the majority status of 1199 and desires to use employee IRS "W-4" forms and/or other documents in the employer's possession bearing employee signatures in an attempt to verify the authorization cards in its possession. The Association has refused to obey the Board's subpoena duces tecum.

The Board's application is before the Court on the memoranda of counsel. The Court has also heard the oral arguments of counsel at a hearing pursuant to the Court's order to show cause. After a careful consideration of the contentions of the parties, the Court in exercise of its discretion GRANTS the Board's application for an order requiring the Association to obey the subpoena duces tecum.

Accordingly, the Martins Ferry Hospital Association is ORDERED to obey the National Labor Relations Board-issued subpoena duces tecum, and the Association through its designated agent at such time and place as the Regional Director of Region 8 of the NLRB may determine, and there produce the records and other data described in the subpoena duces tecum served upon the respondent in Board Case No. 8-CA-10755.

Robert M. Duncan, Judge
United States District Court

NATIONAL LABOR RELATIONS BOARD
REGION 8
1695 Anthony J. Celebrezze Federal Building
1240 East Ninth Street
Cleveland, Ohio 44199
Telephone (216) 522-3715

March 10, 1978

G. Roger King, Esq.
Bricker, Evatt, Barton & Eckler
100 East Broad Street
Columbus, OH 43215

Re: Martin's Ferry Hospital Association
Cases Nos. 8-RC-10584, 8-RC-10586,
8-RC-10587, 8-RC-10588

Dear Mr. King:

This will serve to acknowledge receipt of your March 6, 1978 letter in this office on March 9. In your letter, you ask that I provide you with a copy of certain authorization cards. Those cards, which in effect are considered to be a showing of interest among other things, are not disclosable on the following bases.

Your request for documents revealing the showing of interest must be denied. Such documents are privileged from disclosure under Exemption 6 of Section 552(b) of the Freedom of Information Act, 5 U.S.C. Section 552(b)(6). This exemption operates to privilege from disclosure personnel and medical files and similar files not only of Agency personnel but also the files of other persons which might be in the possession of the Agency in the course of processing a case. Moreover, Exemption 6 requires the Board to balance the right of privacy of affected individuals against the right of the public to be informed. Cf. Getman v. N.L.R.B., 450 F. 2d 670 (C.A.D.C.). Since you have submitted no showing of public interest which would, I find, overcome the privacy right of individuals, their right of privacy must prevail. Masonic Homes of Pennsylvania v. N.L.R.B., ___ F. 2d ___ (C.A. 3), No. 76-1925, issued May 2, 1977.

The investigatory records you request are privileged from disclosure by Exemptions 7(A) and (C) of Section 552(b) of the Freedom of Information Act, 5 U.S.C. Section 552(b)(7(A)) and (7(C)). Exemption 7(A) exempts from disclosure investigatory records where disclosure would interfere with enforcement proceedings. In the processing of cases much information is obtained from parties who would be reluctant or would refuse to supply such information if it were routinely disclosable pursuant to a request under the Freedom of Information Act. In the administration of the Act, the Agency must be able to obtain in its investigations all potentially relevant information. The protection of the identities of individuals and the substance of the information they submit in the Agency's investigation is an important means of assuring the Agency's continuing ability to obtain such relevant

information. If the Agency were forced to disclose information submitted or obtained during the investigation of the case, in circumstances other than those provided by Section 102.118(b) of the Board's Rules and Regulations, it would substantially deter voluntary cooperation, hinder obtaining information from all potential sources and, consequently, substantially interfere with present and future enforcement proceedings. See, Barcelonets Shoe Corp. v. Compton, 271 F. Supp. 591 (D.C.P.R.); Clement Brothers Co. v. N.L.R.B., 282 F. Supp. 540 (D.C. Ga.) affmd., N.L.R.B. v. Clement Brothers Co., 407 F. 2d 1027 (C.A. 5); Wellman Industries, Inc. v. N.L.R.B., 490 F. 2d 427 (C.A. 4), cert. denied, 419 U.S. 834; cf. N.L.R.B. v. Scrivener, 405 U.S. 117; N.L.R.B. v. Golden Age Beverage Co., 415 F. 2d 26 (C.A. 5).

Also, since these investigatory records contain matter personal to the individuals supplying them, and to individuals referred to therein, they are exempt from disclosure under Exemption 7(C) of Section 552(b) of the Freedom of Information Act, 5 U.S.C. Section 552(b)(7)(C), for the considerations set forth under Exemption 6 above.

Further, Exemption 5 of the Freedom of Information Act exempts disclosure of the information you seek, the evidentiary material of parties submitted during investigation. That exemption incorporates the privileges which the Government enjoys under the relevant statutory and case law in the discovery context. Renegotiation Board v. Grumman Aircraft Corp., 421 U.S. 168, 184 (1975). Those privileges include the "executive privilege" for pre-decisional memoranda which reflect the Agency's deliberative process, and the "attorney work product privilege". See, N.L.R.B. v. Sears Roebuck and Co., 421 U.S. 132, 150-154 (1975). When an investigator takes an affidavit or statement in an unfair labor practice investigation, it is done in anticipation of trial and must be viewed as attorney work product, which is not normally discoverable. Hickman v. Taylor, 329 U.S. 495, 512-513 (1947). Moreover, even if the results of the investigation do not warrant a finding that an unfair labor practice has been committed, the affidavits would still be used by the Regional Director in the administrative deliberations leading to the determination of whether or not issuance of a complaint is warranted. See, Brockway v. Department of the Air Force, 518 F. 2d 1184 (C.A. 8, 1975). See also, Hook Drugs, Inc. v. N.L.R.B., 91 LRRM 2801 (S.D. Ind., 1976); Jameo International, Inc. v. N.L.R.B., 91 LRRM 2446 (N.D. Okla., 1976).

The material you request is privileged from disclosure by Exemptions 7(A), (C), and (D) of Section 552(b) of the Freedom of Information Act, 5 U.S.C. Section 552(b)(7(A)), (7(C)) and (7(D)). Exemption 7(A) exempts from disclosure investigatory records where disclosure would interfere with enforcement proceedings. In the investigation of unfair labor practice cases much information is obtained from individuals who would be reluctant or would refuse to supply such information if it were routinely disclosable pursuant to a request under the Freedom of Information Act. In the administration of the Act, the Agency must be able to obtain in its investigations all potentially relevant information. The protection of the identity of individuals and the substance of the information they submit in the Agency's investigation is an important means of assuring the Agency's continuing ability to obtain such relevant information. Individuals supplying evidence in the investigation are given express assurances that such will not be disclosed unless and until the individual is called as a witness in a formal proceeding, as provided for in Section 102.118(b) of the Board's Rules and

Regulations. If the Agency were forced to disclose evidence submitted or obtained during the investigation of the case, in circumstances other than those provided by Section 102.118(b) of the Board's Rules and Regulations, it would substantially deter voluntary cooperation of witnesses, hinder obtaining sworn information from all potential sources and, consequently, substantially interfere with present and future enforcement proceedings. See, Goodfriend Western Corp., d/b/a Wrangler Wranch v. Fuchs, 535 F. 2d 145 (C.A. 1, 1976), cert. denied, October 18, 1976 (No. 76-51); New England Medical Center Hospital v. N.L.R.B., ___ F. 2d ___ (Cal., 1976), Civ. Action No. 76-1288 (C.A. 1, December 28, 1976); Title Guarantee Co. v. N.L.R.B., 534 F. 2d 484 (C.A. 2, 1976), cert. denied, 45 L.W. 3251, (October 4, 1976); Roger J. Au & Son, Inc. v. N.L.R.B., 538 F. 2d 80 (C.A. 3, 1976); Harvey's Wagon Wheel, et al. v. N.L.R.B., 93 LRRM 3069 (C.A. 9, 1976); Climax Molybdenum Co. v. N.L.R.B., ___ F. 2d ___, 92 LRRM 3466 (C.A. 10, 1976); The Cessna Aircraft Co. v. N.L.R.B., ___ F. 2d ___ (C.A. 10, 1976), Civ. Action No. 76-1121 (C.A. 10, October 18, 1976); The Maremont Corp. v. N.L.R.B., ___ F. 2d ___ (C.A. 10, 1976), Civ. Action No. 76-1402 (C.A. 10, October 5, 1976); Atlas Industries, Inc. v. N.L.R.B., 92 LRRM 2676 (N.D. Ohio, 1976); Chrysler Corp. v. N.L.R.B., Civ. Action No. 5-72384 (E.D. Mich., July 7, 1976); Fotomat v. N.L.R.B., 92 LRRM 3708 (D.C. N. Ohio, 1976), appeal pending; N.L.R.B. v. Hardeman Garment Corp., 557 F. 2d 559 (C.A. 6, 1977), 95 LRRM 2780.

Also, since this material contains matter personal to the individual supplying it and to individuals referred to therein, it is exempt from disclosure under Exemption 7(C). This exemption protects the personal privacy of individuals submitting material and individuals named therein, and requires the balancing of their interests in privacy against the interest of a requesting party in disclosure. You have submitted no considerations which would, I find, overcome the privacy rights of individuals and, therefore, their right of privacy must prevail. L' eggs Products, Inc. v. N.L.R.B., 93 LRRM 2488 (D.C. C. Cal., 1976).

The requested material is also within Exemption 7(D) because its disclosure would reveal the identity of a confidential source, i.e., an individual who provides information under an express assurance of confidentiality or in circumstances from which such assurances can reasonably be inferred. As noted above, individuals giving such material to the Agency during the investigation are advised and assured that it will remain confidential, except as provided by Section 102.118 of the Board's Rules and Regulations. This policy of protecting confidential sources of information has been consistently followed in the administration of the Act and is well known to those persons dealing with this Agency. Accordingly, since the individuals furnishing evidence in the instant case are confidential sources, Exemption 7(D) authorizes our refusal to supply the requested material. ITT American Electric v. N.L.R.B., 92 LRRM 2815 (N.D. Miss., 1976); Kaminer v. N.L.R.B., 90 LRRM 2259 (D.C. S. Miss., 1976); The Baptist Memorial Hospital v. N.L.R.B., 92 LRRM 2645 (W.D. Tenn., 1976), appeal pending; Vegas Village Shopping Corp. v. N.L.R.B., 92 LRRM 2683 (C.D. Cal., April 26, 1976), appeal pending.

The undersigned is responsible for the determination that the records you have requested are privileged from disclosure under the Freedom of Information Act. You may obtain a review of that determination under the provisions of Section 102.117(c)(2)(ii) of the Board's rules by filing an appeal with the General Counsel, National Labor Relations Board, Washington, D. C., 20570, within

20 days (excluding Saturdays, Sundays and legal holidays) from the receipt of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Very truly yours,

Bernard Levine

Bernard Levine
Regional Director

cc: Office of Appeals
National Labor Relations Board
Washington, D.C. 20570

Gerald Kobell, Asst. General Counsel

BL/jmh

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

April 7, 1978

G. Roger King, Esquire
Bricker, Evatt, Barton & Eckler
100 East Broad Street
Columbus, Ohio 43215

Re: Martins Ferry Hospital Assn.
Cases Nos. 8-RC-10584
8-RC-10586
8-RC-10587
8-RC-10588

Dear Mr. King:

Your appeal from the Regional Director's refusal to furnish information you requested by letter dated March 6, 1978, has been duly considered.

The appeal is denied substantially for the reasons set forth in the Regional Director's letter of March 10, 1978.

As to your request for authorization cards, it is our position that such material is exempt from disclosure by FOIA exemptions 6 and 7(A), (C) and (D). See The Committee On Masonic Homes of the R.W. Grand Lodge, F&AM of Pennsylvania v. N.L.R.B., 556 F.2d 214; L'Eggs Products, Inc. v. N.L.R.B., 93 LRRM 2488 (D.C. Cal., 1976); N.L.R.B. v. Bio-Physics Systems, Inc., 91 LRRM 3079 (S.D. N.Y., April 12, 1976); Howard Johnson Co., Inc. v. N.L.R.B., 96 LRRM 2214.

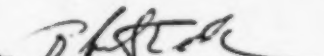
Robert E. Allen, at the direction of and pursuant to the policies established by General Counsel John S. Irving, is responsible for the determination that the records you requested are privileged from disclosure under the FOIA.

Judicial review of this determination may be obtained by filing a complaint in the district court of the United States in the district in which the complainant resides, or has his

place of business, or in which the records are situated, or in the District of Columbia, as provided in the FOIA, 5 U.S.C. Section 552(a)(4)(B).

Very truly yours,

John S. Irving
General Counsel

By 
Robert E. Allen
Director, Office of Appeals

cc: Director, Region 8

284837 R 0-24-01-838522

RAAUIJNZ RUEVDEL6915 1521725-UUUU--RUEVDKJ.

NLRB

FM GEORGE LEET ASSOC EXEC SECY NLRB WSH DC

TO RUEVDKJ/2/DENIS GRANT ESQ C ROGER KING ESQ

BRINCKER EVATT BARTON AND ECKLER

188 EAST BROAD ST COLUMBUS OHIO 43215

TO RUEVDKJ/2/NLRB REG 8 CLEVENALD OH

BT

RE MARTINS FERRY HOSPITAL ASSOCIAION 8 CA 10755 RESPONDENT'S PETITON TO REVOKE SUBPOENA DUCES TECUM IS DENIED ON THE GROUND THAT THE INFORMATION SOUGHT APPEARS TO BE RELEVANT TO THE MATTER UNDER INVESTIGATION. BY DIRECTION OF THE BOARD:

BT

U.S.A. TELETYPE CLEVELAND
JUL 5 8 PM '71

Received 7/27/78

ATTACHMENT NO. 2

NATIONAL LABOR RELATIONS BOARD

REGION 8
1695 Anthony J. Celebrezze Federal Building
1240 East Ninth Street
Cleveland, Ohio 44199

Telephone (216) 522-3715

Dennis D. Grant, Esq.
Bricker, Evatt, Barton & Eckler
100 East Broad Street
Columbus, Ohio 43215

July 25, 1978

RE: MARTINS FERRY HOSPITAL ASSOCIATION
Case No. 8-CA-10755

Dear Mr. Grant:

This will serve to acknowledge receipt of your letter of July 11, 1978 which was received in this office on July 17, 1978. I cannot comply with your request that this office issue subpoenas duces tecum directing National Union of Hospital and Health Care Employees; Licensed Practical Nurse and Skilled Hospital Employees Professional and Economic Security Program, Inc.; Service Employees International Union, Local 47, AFL-CIO and Joan Kalhorn, a field examiner in this office, to appear before you on July 31, 1978, at Martins Ferry Hospital Association in order that they testify in the above-noted matter and further requiring them to produce at that time all union authorization and membership cards in the appropriate unit at the Hospital.

The General Counsel of the National Labor Relations Board on behalf of the Board has the final authority with respect to the investigation of charges and the issuance of complaints under the National Labor Relations Act, as amended. During an investigation of such charges, the General Counsel may determine that it is necessary to resort to subpoenas in order to ascertain the facts on which to base an administrative decision on the merits. However, there is no comparable right to an investigative subpoena available to parties other than the General Counsel. The National Labor Relations Board Casehandling Manual (Part I), Unfair Labor Practice Proceedings, Section 11770.

Moreover, compliance with your request would be tantamount to allowing you to use prehearing discovery. However, the courts have consistently held that such discovery is within the Board's discretion, which the Board has uniformly declined to allow. NLRB v. Vapor Blast Mfg. Co., 287 F. 2d 402 (CA7 1961); Electromec Design & Development Co., v. NLRB, 409 F. 2d 631, 635 (CA9 1969); NLRB v. Interboro Contractors, Inc., 432 F. 2d 854, 858 (CA2 1970). cert denied, 402 U. S. 915 (1971); D'Youville Manor, Lowell, Mass., Inc. v. NLRB, 526 F. 2d 3. 7 (CA1 1975); NLRB v. Valley Mold Co., 530 F. 2d 693, 695 (CA6 1976).

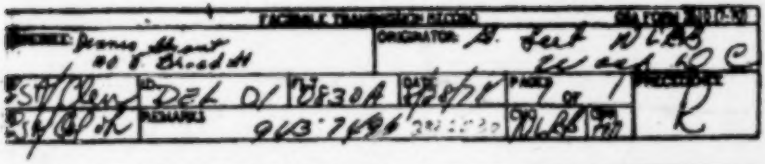
Furthermore, the investigatory records you request that I allow you to subpoena which are in the Board's possession are privileged from disclosure by Exemptions 7(A) and (C) of Section 552(b) of the Freedom of Information Act, 5 U.S.C. Section 552(b)(7(A)) and (7(C)). Exemption 7(A) exempts from disclosure investigatory records where disclosure would interfere with enforcement proceedings. In the processing of cases much information is obtained from parties who would be reluctant or would refuse to supply such information if it were routinely disclosable pursuant to a request under the Freedom of Information Act. In the administration of the Act, the Agency must be able to obtain in its investigations all potentially relevant information. The protection of the identities of individuals and the substance of the information they submit in the Agency's investigation is an important means of assuring the Agency's continuing ability to obtain such relevant information. If the Agency were forced to disclose information submitted or obtained during the investigation of the case, in circumstances other than those provided by Section 102.118(b) of the Board's Rules and Regulations, it would substantially deter voluntary cooperation, hinder obtaining information from all potential sources and, consequently, substantially interfere with present and future enforcement proceedings. See, Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591 (D.C.P.R.); Clement Brothers Co. v. N.L.R.B., 289 F. Supp. 540 (D.C. Ga.) affmd, N.L.R.B. v. Clement Brothers Co., 407 F. 2d 1027 (C.A. 5); Wellman Industries, Inc. v. N.L.R.B., 490 F. 2d 427 (C.A. 4), cert denied, 419 U.S. 834; cf. N.L.R.B. v. Scrivener, 405 U.S. 117; N.L.R.B. v. Golden Age Beverage Co., 415 F. 2d 26 (C.A. 5).

Therefore, I am denying your request that this office issue the subpoenas duces tecum you requested.

Very truly yours,

John Kollar
Acting Regional Director

JK/ram



303440 R 8-14-81-000861

RRAUIJNI RUEVDNL0001 0308030-UUUU--RUEVDNJ.

NLRB

FM GEORGE LEET ASSOC EXEC SECY NLRB WSH DC

TO RUEVDNJ/E/DENIS GRANT ESQ AND G. ROGER KING ESQ BRICKER EWATT

BARTON AND ECKLER 100 EAST BROAD ST COLUMBUS OH 43215 614 227 8300

TO RUEVDNJ/E/NLRB REG 8 CLEVELAND OH

BT

RE MARTINS FERRY HOSPITAL ASSOCIATION 8 CA 10755 RESPONDENT'S

REQUEST FOR PERMISSION TO APPEAL THE REGIONAL DIRECTOR'S RULING

DENYING REQUESTS FOR SUBPOENAS IS HEREBY DENIED. BY DIRECTION OF THE

BOARD; DATED AUG. 28, 1978

BT

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
MAY 27 1981
JOHN P. HEHMAN, Clerk

No. 79-3408

NATIONAL LABOR RELATIONS BOARD,

Plaintiff-Appellee,

v.

MARTINS FERRY HOSPITAL ASSOCIATION,

Defendant-Appellant.

Before: LIVELY and MERRITT, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed as modified in accordance with the opinion filed this date.

Each party to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

Issued as Mandate:

COSTS:

Filing fee.....$
Printing $

Total $

A True Copy.

Attest:

Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

JUL 17 1981

JOHN P. HEHMAN, Clerk

No. 80-3118

MARTINS FERRY HOSPITAL ASSOCIATION,

Plaintiff-Appellant,

vs.

NATIONAL LABOR RELATIONS BOARD,
JOHN FANNING, and BERNARD LEVINE,

Defendants-Appellees.

Before: WEICK, KENNEDY, and MARTIN, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendant-Appellee recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

Issued as Mandate:

COSTS:

Filing fee.....$
Printing $

Total $

A True Copy.

Attest:

Deputy, Clerk

SUBCHAPTER II—NATIONAL LABOR RELATIONS—Cont'd

§ 161. Investigatory powers of Board

For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title—

Documentary evidence; summoning witnesses and taking testimony

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details

when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under

any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Sen-

ate for referral to the appropriate committees of the Congress. The report shall include--

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsections (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E),(F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

Appendix

81-486

Office-Supreme Court, U.S.
FILED
SEP 9 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

NO. _____

MARTINS FERRY HOSPITAL ASSOCIATION,
PETITIONER,
v.

NATIONAL LABOR RELATIONS BOARD, et. al.,
RESPONDENTS.

PETITIONER MARTINS FERRY HOSPITAL ASSOCIATION'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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APPENDIX A

Nos. 79-3408-09

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Plaintiff Appellee,

v.

MARTINS FERRY HOSPITAL ASSOCIATION,

Defendant-Appellant.

MARTINS FERRY HOSPITAL ASSOCIATION,

Plaintiff-Appellant,

v.

NATIONAL LABOR RELATIONS BOARD,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Decided and Filed May 27, 1981.

Before: LIVELY and MERRITT, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

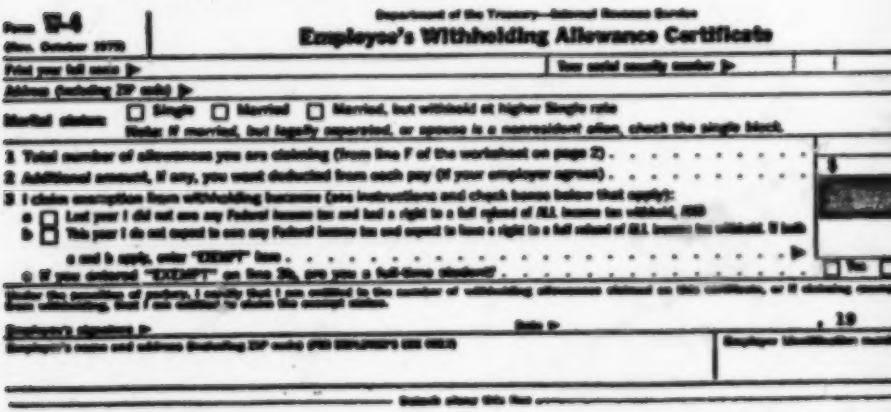
PHILLIPS, Senior Circuit Judge. Case No. 79-3408 is before the court on the appeal of Martins Ferry Hospital Association of Martins Ferry, Ohio (the Hospital) from the order of District Judge Robert M. Duncan, requiring the Hospital to obey a subpoena duces tecum issued by the Board. Judge Duncan directed the Hospital to turn over to the Board the original or copies of IRS W-4

forms[1] of its employees, for use by the Board in connection with the General Counsel's investigation of Board Case No. 8-CA-10755. The stated purpose of the Board is to compare the signatures on the W-4 forms with purported signatures of employees on union membership authorization cards now in the Board's

---

[1] The W-4 form in part is as follows:

[1] The W-4 form in part is as follows:



Form W-4
(Rev. October 1978)

Department of the Treasury—Internal Revenue Service

Employee's Withholding Allowance Certificate

Print your full name ▶ | Your social security number ▶

Address (including ZIP code) ▶

Marital status: ☐ Single ☐ Married ☐ Married, but withhold at higher Single rate

Note: If married, but legally separated, or spouse is a nonresident alien, check the single block.

1 Total number of allowances you are claiming (from line F of the worksheet on page 2) . . . . . $

2 Additional amount, if any, you want deducted from each pay (if your employer agrees) . . . . .

3 I claim exemption from withholding because (see instructions and check boxes below that apply):

a ☐ Last year I did not owe any Federal income tax and had a right to a full refund of ALL income tax withheld, AND

b ☐ This year I do not expect to owe any Federal income tax and expect to have a right to a full refund of ALL income tax withheld. If both a and b apply, enter "EXEMPT" here . . . . . ▶

4 If you entered "EXEMPT" on line 3b, are you a full-time student? . . . . . ☐ Yes ☐

Under the penalties of perjury, I certify that I am entitled to the number of withholding allowances claimed on this certificate, or if claiming exemption from withholding, that I am entitled to claim the exempt status.

Employee's signature ▶ Date ▶ , 19

Employer's name and address (including ZIP code) (FOR EMPLOYER'S USE ONLY) | Employer identification number

Detach along this line

possession to determine whether a union is authorized to represent a majority of certain employees of the Hospital.

Case No. 79-3409 is before the court on the appeal from the summary judgment of District Judge Duncan refusing to order the Board to disclose to the Hospital the membership authorization cards purportedly signed by certain Hospital employees.

On September 25, 1979, this court entered a stay order in case No. 79-3408 and consolidated the two cases for hearing on appeal.

We affirm the decision of the district court in case No. 79-3409. We dissolve the September 25, 1979, stay order entered by this court in case No. 79-3408, modify the judg-

ment of the district court in that case and affirm it as modified.

I

On September 15, 1976, the Licensed Practical Nurse and Skilled Employees Professional and Economic Security Program, Inc. (LPN-SHEP), a labor organization, filed with the Board a petition requesting that an election be held among the Hospital's technical employees. LPN-SHEP claimed to represent at least 30 per cent of the technical employees. Authorization cards purportedly signed by employees designating LPN-SHEP as their collective bargaining representative were submitted to the Board.

Another labor organization, Local 1199, National Union of Hospital and Health Care Employees (Local 1199),

also filed three petitions seeking representation of three separate units of the Hospital's employees. Two of these three petitions claimed that 30 per cent or more of the employees in the requested unit supported Local 1199 as their collective bargaining representative. The third petition averred that a substantial number of employees supported Local 1199. On September 30, 1976, LPN-SHEP, in connection with a third labor organization, intervened with respect to one of Local 1199's petitions.

The Regional Director ordered elections in the three voting units petitioned for by the labor organizations. On December 16, 1978, elections conducted by the Board were held at the Hospital. A majority of

the eligible voters in each unit voted against representation by any labor organization. Local 1199 filed 27 objections to the election, alleging pre-election misconduct by the Hospital. On January 24, 1977, Local 1199 filed an unfair labor practice charge against the Hospital, averring various acts allegedly rendering a fair election impossible. Local 1199 also claimed that it represented a majority of the Hospital's employees, as demonstrated by signed authorization cards, and that the Hospital unlawfully refused to bargain with this Union. The Board was asked to issue an order requiring the Hospital to bargain with Local 1199 as the exclusive representative of its employees in the respective units.

At the request of the General Counsel, the Board issued a subpoena duces tecum requiring the Hospital to produce IRS W-4 forms, or if such forms were unavailable, other documents bearing signatures of all employees in the involved units covering the period from June through October, 1976. On June 1, 1978, the Board denied the Hospital's petition to revoke the subpoena, stating that the "information sought appear[ed] to be relevant to the matter under investigation." The Hospital refused to comply with the subpoena.

On August 1, 1978, the Board filed an application in the district court for an order requiring that the Hospital obey its subpoena duces tecum.

The appeal from the decision of the district court granting the relief prayed by the Board is case No. 79-3408.

On June 5, 1978, the Hospital filed its complaint in the district court under the Freedom of Information Act praying an injunction requiring the Board to make available to the employer the membership authorization cards allegedly executed by its employees. The district court granted the Board's motion for summary judgment, holding that the membership application cards are exempt from the Freedom of Information Act. The appeal from this judgment is case No. 79-3409.

II

It is well settled that a subpoena

issued by the Board pursuant to 29 U.S.C. § 161(1) should be enforced if "the matter under investigation is within the jurisdiction of the Board and . . . the evidence subpoened is related to that matter and is described with 'sufficient particularity'." N.L.R.B. v. ITT Telecommunications, 415 F.2d 768, 769 (6th Cir. 1969); United States v. Morton Salt Co., 338 U. S. 632, 652 (1950). See also Goodyear Tire and Rubber v. N.L.R.B., 122 F. 2d 450 (6th Cir. 1941). This rule includes IRS W-4 forms signed by employees of a company against which a charge of unfair labor practice is pending before the Board. N.L.R.B. v. Playskool, Inc., 431 F. 2d 518, 519 (7th Cir. 1970).

Section 10057, N.L.R.B. Casehandling Manual (Part One), Unfair Labor Practice Proceedings, contains this statement of Board policy:

> Authorization Cards: Establishing Authenticity
>
> In all proceedings before the Board, the General Counsel offers only evidence which he has reason to believe is true and authentic. It is mandatory upon Regions to establish the authenticity of such authorization cards before issuance of complaint. (Emphasis added.)

In his order requiring the Hospital to obey the subpoena duces tecum issued by the Board, District Judge Duncan emphasized that the Board is attempting to determine the asserted majority status of Union 1199 and needs to use IRS W-4 forms or other documents in the employer's possession bearing employee signatures

'n order to determine the validity of signatures on authorization cards. The Union is seeking a bargaining order pursuant to N.L.R.B. v. Gissel Packing Co., 395 U. S. 575, 614 (1969), which held that the Board may issue a bargaining order to remedy employer unfair labor practices which have undermined the majority strength of the Union to such an extent as to prevent the holding of a fair election "where there is a showing that at one point the union had a majority."

The Hospital contends that the subpoena unnecessarily interferes with the right of privacy of hospital employees. It is true that Form W-4 contains personal information concerning employees which could be of no interest or concern of the Board,

such as marital status, number of income tax allowances claimed, amount desired to be deducted each payday, exemptions from withholding claimed and the ground for the exemptions. To avoid this disclosure of private information, this court modifies the order of the district court so as to permit the Hospital, in lieu of furnishing the original W-4 forms to the Board, at the option of the Hospital to provide legible copies of W-4 forms of its employees during the period specified in the subpoena, made by a copying machine, obliterating all information on the form except the full name and address, social security number and signature of the employee and the date the W-4 was signed. With this modification, the judgment of the

district court in case No. 79-3408 is affirmed.

III

The district court correctly held that the union authorization cards sought by the Hospital are exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552. N.L.R.B. v. Robbins Tire and Rubber Co., 437 U.S. 214 (1978); Howard Johnson Co. v. N.L.R.B., 618 F.2d 1 (6th Cir. 1980); Madeira Nursing Center, Inc. v. N.L.R.B., 615 F.2d 728 (6th Cir. 1980); N.L.R.B. v. Hardeman Garment Corp., 557 F.2d 559 (6th Cir. 1977). Authorization cards, like the witness statements in Robbins Tire, are investigatory records in the possession of the Board for enforcement purpose. Authorization cards are not discoverable by an employer under the rules of the Board,

and discovery cannot be attained under the Freedom of Information Act.

The Hospital contends that the district court failed to protect the Hospital's fifth amendment right to substantive due process by permitting the Board to engage in pre-trial discovery while denying the Hospital equal discovery. We hold this contention to be without merit. N.L.R.B. v. Valley Mold Co., 530 F. 2d 693, 695 (6th Cir.), cert denied, 429 U.S. 824 (1976).

If the current investigation conducted by the General Counsel should result in the filing of a complaint, the Hospital will be entitled to a due process hearing, including an opportunity to compare signatures on authorization cards with signatures

on the W-4 forms, and to introduce evidence in opposition to any effort on the part of the General Counsel to obtain a Gissel bargaining order. Any failure on the part of the Board to conduct a due process hearing can be challenged in proceedings before the Board and, if necessary, by petition to review filed in this court. ITT v. Electrical Workers, 419 U. S. 428, 448 (1975); N.L.R.B. v. Valley Mold Co., Inc., supra, 530 F. 2d 693 (6th Cir.), cert. denied, 429 U. S. 824 (1976).

The judgment of the district court in case No. 79-3408 is modified as hereinabove set forth, and affirmed as modified. The judgment of the district court in case No. 79-3409 is affirmed. No costs are taxed. Each

party will bear its own costs in this court.

No. 80-3118

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARTINS FERRY HOSPITAL ASSOCIATION,

Plaintiff-Appellant,

v.

NATIONAL LABOR RELATIONS BOARD, JOHN FANNING, and BERNARD LEVINE,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Ohio.

Decided and Filed July 17, 1981.

Before: WEICK, KENNEDY, and MARTIN, Circuit Judges.

PER CURIAM. The sole issue in this case is whether section 11(1) of the National Labor Relations Act, 29 U.S.C. § 161(1) requires the National Labor Relations Board to issue subpoenas to a requesting party during the investigative phase of an unfair labor practice proceeding.

Martins Ferry Hospital Association operates a hospital in Martins Ferry, Ohio. On December 16, 1976, the Board conducted elections in three voting units at the hospital. A majority of the eligible voters in each unit voted against any union representation. On January 24, 1977, one of the unions which lost the

election filed an unfair labor practice charge, alleging that the Hospital violated sections 8(a)(1), (2), (3), and (5) of the Act. The union further alleged that it represented a majority of the employees in the appropriate units, as evidenced by signed authorization cards.

The General Counsel began to investigate the charge, including the allegation of majority support. In order to authenticate the signatures on the authorization cards, the Board, at the General Counsel's request, issued to a field examiner a subpoena duces tecum directing the Hospital to produce IRS W-4 forms or other documents bearing employee signatures. This case involves the Hospital's request that the Board issue to it subpoenas

comparable to the one issued to the Board's field examiner. The Hospital would like subpoenas directing the field examiner and the unions involved in the unfair labor practice proceedings to turn over the originals or true copies of all authorization cards signed by the Hospital's employees during the pre-election period under investigation. On July 25, 1978, the Acting Regional Director denied the request.

The Hospital subsequently filed this action in the District Court for mandamus relief under 28 U.S.C. §1361, seeking an order compelling the Board to issue the subpoenas requested by the Hospital. The District Court concluded that the Hospital failed to prove that the Board had a clearly es-

tablished and plainly defined duty to issue the subpoenas. The Court noted that the Board had a mandatory duty under section 11(1) to issue subpoenas upon application of "any party to such proceedings." However, it determined that the Board's interpretation of the provision -- that "proceedings" begin only after the Board had issued a complaint in the case -- is not clearly wrong. Because the duty alleged by the plaintiff is not indisputable and peremptory, and because the court's mandamus jurisdiction under 28 U.S.C. §1361 is contingent upon a proper showing of a right to relief, the District Court dismissed the case with prejudice.

We affirm. As pointed out by the District Court, this Court has out-

lined the scope of traditional mandamus relief: "Before petitioner may resort to the extraordinary writ of mandamus, he must establish that he has a clear and certain right and that the duties of the respondent are ministerial, plainly defined and peremptory." United States v. Battisti, 486 F.2d 961, 964 (6th Cir. 1973), citing Albert v. United States District Court for Western District of Michigan, 283 F.2d 61, 62 (6th Cir. 1960). We agree that the word "proceeding" in section 11(1) is not without ambiguity, and that the duty which the Hospital contends is imposed by Section 11(1) is not so clearly established that the Hospital is entitled to mandamus relief.

Accordingly, the judgment of the District Court is affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

Case No. C-2-79-826

MARTINS FERRY HOSPITAL ASSOCIATION,

Plaintiff,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.,

Defendants.

MEMORANDUM AND ORDER

This is one of a handful of cases arising out of a labor representation election dispute at the Martins Ferry Hospital in 1976. Upon losing the election, a union filed charges with the National Labor Relations Board (NLRB)

alleging that plaintiff committed unfair labor practices that destroyed the union's card-based majority status. In order to confirm the union's majority status, it is necessary to conduct a comparison of the signatures on the union authorization cards with the employees' signatures. To make this comparison, the Board subpoenaed W-4 forms for plaintiff's employees. By an order dated February 5, 1979, in a related case, this Court ordered plaintiff to obey the subpoena and rejected a challenge that the W-4's were privileged from disclosure for these purposes. Martins Ferry Hospital Association v. NLRB, Case No. C-2-78-529 (Feb. 5, 1979).

The court also held that the Freedom of Information Act (FOIA) prohibited plaintiff from obtaining authorization

cards held by the NLRB. This lawsuit represents another attempt by the employer to get information which would enable it to conduct its own handwriting comparison.

Unable to obtain this information from the government, plaintiff requested the NLRB to issue subpoenas to three labor unions and an individual, Ms. Joan L. Kalhorn, for the production of originals or copies of authorization cards signed by plaintiff's employees during the relevant period. The NLRB, by letter dated July 25, 1978, refused to issue the requested subpoenas and by telegram dated August 28, 1978, denied plaintiff's request to appeal the letter ruling. Plaintiff alleges that this evidence does not appear to have been solicited or considered by the NLRB in

its investigation of the charges and may effectively rebut an alleged card-based majority in the union. It therefore asserts that the NLRB has a non-discretionary duty to issue the subpoenas under §11(1) of the National Labor Relations Act (hereafter "the Act"), 29 U.S.C. §161(1). Accordingly, plaintiff has filed this lawsuit predicating jurisdiction on 28 U.S.C. §1361, seeking an order in the nature of mandamus compelling the NLRB to issue the subpoenas.

This matter came on for hearing on plaintiff's motion for a preliminary injuction granting the relief sought. Since that time, defendant has moved for summary judgment, and that motion has now become ripe for decision

as well. On the basis of the briefs of the parties,[1] the arguments at the hearing, and the evidence submitted to the Court, I conclude there are no genuine issues of material fact remaining on the record, and I accordingly make the following findings and conclusions on the merits as required by Fed. R. Civ. P. 52(a) and 56.

It is important preliminarily to note what this case is not about. First, this is not a case seeking judicial review of NLRB proceedings. At one point the NLRB did notify the plaintiff that the Board's telegraphic order refusing to issue the subpoenas was a final order which plaintiff was free to pursue in court. However, when the plaintiff attempted to seek judicial review of the "order" in the circuit court of

appeals, the NLRB argued and that court found, that the order was not final within the meaning of 29 U.S.C. §160(f) and it therefore was without jurisdiction to hear plaintiff's petition. Martins Ferry Hospital Assn. v. NLRB, Case No. 79-1172 (6th Cir. Aug. 8, 1979).

Accordingly, §10(f) of the Act, 29 U.S.C. §160(f), providing for exclusive review of NLRB orders in the circuit court of appeals does not deprive this Court of jurisdiction.

Nor, with one exception, does this case concern matters in the hands of a government agency. Joan L. Kalhorn is the investigating agent for the NLRB. Any subpoenaed documents in her possession pursuant to her official capacity would presumably be protected by this Court's earlier order in Case No.

C-2-78-529. With respect to the three subpoenas which plaintiff seeks to have issued to unions, however, the government clearly has no standing to raise FOIA exemption arguments. Plaintiff has made clear that it seeks only documents in the possession of the unions. Therefore, the Freedom of Information Act is not at issue here. See Chrysler Corp. v. Brown, 47 U.S.L.W. 4437, 60 L.Ed.2d 208, 219-20 (1979).

Finally, for clarity it should be pointed out that this case does not present the issue whether, for the purposes of exercising jurisdiction under 28 U.S.C. §1337, the Board's action was "in excess of its delegated powers and contrary to a specific prohibition of the Act." Leedom v. Kyne, 358 U.S. 184 (1958). That case recognized the power

of district courts to remedy Board action where the Board violates a "clear and mandatory" duty. Nonetheless, although plaintiff does not assert jurisdiction under 28 U.S.C.§1337, the tests for this Court's jurisdiction, as discussed below, are very similar.

This case is brought pursuant to 28 U.S.C. §1361. This Court has jurisdiction under that provision to determine whether a duty is owed the plaintiff by the defendant and if so, to order the defendant to comply.

The issue in this case is whether the NLRB has violated a mandatory duty to issue the subpoenas requested by plaintiff. Plaintiff states that such a duty is stated in §11(1) of the Act, which provides in relevant part:

> For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title--
>
> (1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application.

In construing this provision to determine whether it imposes the kind of duty the performance of which may be compelled under 28 U.S.C.§1361, the Court must apply a standard not unlike that prescribed in Leedom v. Kyne for

review pursuant to 28 U.S.C. §1337.

It is generally accepted that §1361 neither broadens nor limits traditional mandamus relief, but merely extends venue to all district courts. Hence, the court is to be guided by common law mandamus principles when apply this section. Davis v. Shultz, 453 F.2d 497, 502 (3d Cir. 1971); Carter v. Seamans, 411 F.2d 767, 773 n.11 (5th Cir. 1969), cert. denied, 397 U.S. 941 (1970); Loveladies Property Owners Assn., Inc. v. Raab, 430 F. Supp. 276, 282 (D. N.J. 1975), aff'd., 547 F.2d 1162 (3d Cir. 1976); Nixon v. Hampton, 400 F. Supp. 881, 885 (E.D. Pa. 1975); City of Highland Park v. Train, 374 F. Supp. 758 (N.D. Ill. 1974), aff'd., 519 F.2d 681, 691 n.8 (7th Cir. 1975), cert. denied, 424 U.S. 927 (1976).

The scope of traditional mandamus relief has been clearly stated by the Court of Appeals for this Circuit:

> Before petitioner may resort to the extraordinary writ of mandamus, he must establish that he has a clear and certain right and that the duties of the respondent are ministerial, plainly defined and peremptory.

United States v. Battisti, 486 F.2d 961 (6th Cir. 1973), citing Albert v. U. S. District Ct. for Western District of Michigan, 283 F.2d 61, 62 (6th Cir. 1960).

Not only is it necessary that a duty is owed to the plaintiff to give this Court jurisdiction but also the duty itself must be clearly established and plainly defined and the obligation to act must be peremptory. King v. Morton, 520 F.2d 1140, 1146 (D.C. Cir. 1975).

In this case there is no question that the duty to issue the subpoenas, under the appropriate circumstances, is mandatory and ministerial. Construing this section, the United States Supreme Court has stated, "The Act makes clear that the issuance of subpoenas is mandatory . . . . Upon application of a proper party the subordinate official automatically issues the subpoena to the applicant. There is involved no delegation of any act entailing the exercise of discretion. The agents issuing the subpoenas perform ministerial acts only." Lewis v. Labor Board, 357 U.S. 10, 14-15 (1958).

Thus, it is settled that the NLRB has a mandatory duty which is triggered by "application of any party to such proceedings." The focus of the parties'

dispute is the question: when can it be said that an application is made by a party to the proceedings such that the Board's duty is triggered?

The Board has made its own interpretation of §11(1) and has issued regulations pursuant to this interpretation. According to the Board, a party may obtain a subpoena only after the Board has issued a complaint in a case--only then are there "proceedings" to which the applicant can be a party. After the filing of a charge but prior to the issuance of a complaint, there exists only an "investigation" conducted by the Board to determine whether a complaint should issue. Before it makes this determination, only the Board itself has authority to issue subpoenas pursuant to its general grant of authority as the

exclusive body empowered to investigate and remedy unfair labor practices. 29 U.S.C. §153.

Notwithstanding the Board's interpretation, plaintiff argues that the plain language of the statute does not support such a construction but rather that it clearly requires the subpoena to issue at any time during the investigatory as well as hearing phases of unfair labor practice proceedings.

At first blush, the plaintiff's interpretation carries much force. As plaintiff points out, the statute provides in its preamble that it applies for the purpose of "all hearings and investigations." The Board's mandatory duty is triggered by the application of "any party to such proceedings." The effect of the inherently reflexive word

"such" may reasonably be read to make the meaning of "proceedings" dependent upon a prior concept to which it refers, in this case "all hearings and investigations" to which the section is made applicable by the preamble.

Further, the statute provides for the revocation of a subpoena, once issued, if the Board, in the exercise of its discretion, finds that certain conditions are met:

> Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with particularity the evidence whose production is required.

The provision that a subpoena may be revoked if it pertains to evidence which "does not relate to any matter under investigation" tends to support plaintiff's reading as does the language at the end of the first paragraph referring disjunctively to "evidence in such proceeding or investigation". Plaintiff's interpretation, on the face of the statute, is plausible and even persuasive.

Nonetheless, I am unable to conclude that the plaintiff's reading is so certain as to permit this Court to exercise its jurisdiction under the mandamus statute.

Although the bare text of the statute tends to favor the plaintiff's interpretation, the use of the word "proceeding" in different meanings contributes to some ambiguity in the meaning of the

statute; as this Court has noted before, the apparent plain meaning of a statute may yield to ambiguity when viewed in context. In this case, the ostensibly plain meaning of the statute is drawn into question by the policies and practices of the Board itself.

It has been observed that one of the limitations on a court's mandamus power is that "when performance of an official duty requires an interpretation of the law which governs that performance, the interpretation placed by the officer on the law will not be interfered with, certainly, unless it is clearly wrong and the official action arbitrary and capricious." Hammond v. Hull, 131 F.2d 23, 25 (D.C. Cir. 1942), cert. denied, 318 U.S. 777 (1943); Hanecke v. Secretary of Health, Education & Welfare, 535 F.2d

1291, 1296 (D.C. Cir. 1976). While this does not necessarily mean that the need for a court to construe the statutory provision which forms the basis of the action is a bar to the remedy of mandamus, Hanecke, supra, at 1296-97 n.16, it does prompt this Court to look for highly compelling reasons why the agency's interpretation is plainly wrong. I do not find them here.

The Board's interpretation is in line with its longstanding practice of limiting discovery in pre-hearing phases of labor investigations. This practice has, in another context, received the blessing of the Supreme Court. In NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978), the Court examined the question whether witness statements that the Board intended to use in unfair labor

practice proceedings were subject to disclosure to the charged party under the FOIA. Much of the Court's opinion deals with interpretation of the FOIA and Congress' intentions concerning §7(A), permitting non-disclosure of material tending "to interfere with enforcement proceedings." In order to determine whether the disclosure of potential witnesses' statements prior to hearing would interfere with enforcement proceedings in an unfair labor practice case, the Court examined the historical practices of the NLRB with regard to discovery. It stated:

> Historically, the NLRB has provided little prehearing discovery in unfair labor practice proceedings and has relied principally on statements such as those sought here to prove its case. While the NLRB's discovery policy has been

> criticized, the Board's position that §6 of the NLRA, 29 U.S.C. §156, commits the formulation of discovery practice to its discretion has generally been sustained by the lower courts. A profound alteration in the Board's trial strategy in unfair labor practice cases would thus be effectuated if the Board were required, in every case in which witnesses' statements were sought under FOIA prior to an unfair labor practice proceeding, to make a particularized showing that release of these statements would interfere with the proceeding.

The Court expressed concern that this would not only change the substantive discovery rules, but that the resulting trial of FOIA cases would likely cause substantial delays in the adjudication of unfair labor practice charges and that these delays would adversely affect the Board's ability to carry out its duty to investigate and prosecute

violations of the labor laws. Robbins Tire, supra, at 238. The Court concluded that "Our reluctance to override a long tradition of agency discovery, based on nothing more than an amendment to a statute designed to deal with a wholly different problem, is strengthened by our conclusion that the dangers posed by premature release of the statements sought here would involve precisely the kind of interference with enforcement proceedings that [§7(A) of the FOIA] was designed to avoid."

Some of the concerns expressed by the Supreme Court in Robbins Tire and recognized by this Court's earlier ruling on the FOIA--for example, delays caused by immediate interlocutory appeal of FOIA issues-- are not pertinent here. Moreover, it should be stressed that

the Robbins Tire decision, resting as it does almost wholly upon the Court's interpretation of congressional intention regarding the Freedom of Information Act, does not control this case. Nonetheless, the Court's discussion of NLRA policy and the practice of the Board with respect to prehearing discovery lends sufficient support for the Board's interpretation of the statute that it effectively renders any "duty" the Board may have to act differently too ambiguous and uncertain to warrant mandamus relief here. See Mayfield Dairy Farms, Inc. v. NLRB, Civil Action No. C79-21A (N.D. Ga. Jan. 19, 1979, slip op. 4, 6-7) in which the court determined that two possible interpretations of §11(1) prevented its finding that the NLRB's refusal to issue an "investigative subpoena" so "manifest"

a violation of the statute as to warrant invocation of the court's equity powers under 28 U.S.C. §1337. See also City of Milwaukee v. Saxbe, 546 F.2d 693, 701 (7th Cir. 1976); McGaw v. Farrow, 472 F.2d 952 (4th Cir. 1973).

Finding as I do, that the Board's interpretation of §11(1) and resulting practice are not clearly wrong, and that the duty alleged by the plaintiff is not indisputable and peremptory, I accordingly conclude that the plaintiff is not entitled to relief pursuant to 28 U.S.C. §1361. This Court's jurisdiction being apparently contingent upon a proper showing of a right to relief under that section,[2] this case is hereby DISMISSED with prejudice.

It is so ORDERED.

Robert M. Duncan, Judge
United States District Court

[1]In addition, plaintiff has filed a motion to strike defendant's post-hearing brief or motion for leave to reply out of time. Defendant has filed a "motion for leave to file a motion for an extension of time to file a post-hearing brief." In the interest of rendering as fully-informed a decision as possible, the plaintiff's motion to strike will be DENIED, the plaintiff's motion for leave to reply and the defendant's motion for leave are GRANTED. The Court has considered both the plaintiff's memorandum submitted November 14, 1979, and the defendant's "post-hearing brief" filed November 5, 1979, in ruling on this case.

[2]While difficulties with this approach as a matter of logical-and practical application are obvious, the proposition that the court's jurisdiction hinges

upon a proper statement of a claim under traditional mandamus principles appears to be the law. Cook v. Arentzen, 582 F.2d 870 (4th Cir. 1978); City of Milwaukee v. Saxbe, 546 F.2d 693, 700 (7th Cir. 1976); National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974).

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

Case No. C-2-78-529

MARTINS FERRY HOSPITAL ASSOCIATION,

Plaintiff,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.,

Defendants.

MEMORANDUM AND ORDER

This case arose from existing difficulties between the Martins Ferry Hospital Association (the Association) and the defendants, National Labor Relations Board (the Board), and Bernard Levine, Regional Director, Region Eight, National Labor Relations Board (the Regional Director).

I

On September 15, 1976, the Licensed Practical Nurse and Skilled Hospital Employees Professional and Economic Security Program, Inc., successor of and affiliated with Licensed Practical Nurse Association of Ohio, Inc. (LPN-SHEP) filed a petition with the Board requesting that an election be held among the hospital association's technical employees, claiming that the petition was supported by at least 30% of the employees. Also submitted were authorization cards allegedly signed by certain employees designating LPN-SHEP as their collective bargaining representative.

The National Union of Hospital and Health Care Employees, 1199, West

Virginia, RWDSU, AFL-CIO (Local 1199) intervened in the above-mentioned petition. It filed three petitions seeking representation elections among the Association's technical employees, office clerical employees, and service and maintenance employees. Each of Local 1199's petitions generally allege that a substantial number of employees wish to be represented and that each petition, except one, was supported by 30% or more of the employees in the requested unit.

One September 30, 1976, LPN-SHEP, jointly with Service, Hospital, Nursing Home and Public Employees Union Local No. 47, affiliated with the Service Employees International Union (SEIU) intervened in Local 1199's service and maintenance unit petition. After a hearing, the Regional Director on

November 17, 1976, issued a Direction of Election in the voting units petitioned for by the labor organizations.

On December 16, 1976, a Board-conducted election was held at the hospital. A majority of the eligible voters in each unit voted against representation by any labor organization. Following the election, Local 1199 filed 27 alleged objections to the Association's pre-election conduct.

Since January 1977, Region 8 has been in the process of investigating Local 1199's charges. Letters and questionnaires have been sent to Association employees, telephone calls have been made, and personal contacts have been made by employees of Region 8.

The Association claims that "Region 8 has stated that it intended to file a

complaint against the Association seeking an order requiring it to bargain with Local 1199 for service, maintenance, technical, and business office clerical units notwithstanding the election results." Region 8 has attempted to subpoena Internal Revenue Service forms W-4 in the possession of the Association for all of its employees.

II

Plaintiff's complaint alleges that in accordance with the Freedom of Information Act, 5 U.S.C. §552 (1977) the Association is entitled to have copies of certain "executed membership-authorization cards" in the possession of the defendants made available to it. Plaintiff also requests that defendants be ordered to make available to it a

copy of a "certain memorandum from defendant Board's Division of Advice," again claiming entitlement under 5 U.S.C. §552. The defendants have refused to allow plaintiff's request for this information. The defendants have moved for summary judgment on the following grounds:

1. That there are no genuine issues of fact involved in this proceeding; and

2. That defendants are entitled to judgment as a matter of law on plaintiff's requests for injunctive relief, since the documents which plaintiff seeks are exempt from disclosure under 5 U.S.C. §552 (b)(5), (6) and 7(A), (C), and (D) of the Freedom of Information Act.

The motion for summary judgment is pending, plaintiff having responded by memorandum contra with exhibits attached. Although the plaintiff urges the Court otherwise, I believe the material facts

are not in genuine dispute; therefore, the issues raised by plaintiff's complaint are amenable to disposition by summary judgment.

FOIA as enacted in 1966 contained an exemption for "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 5 U.S.C. §552(b)(7). In 1974 the Congress amended this section in response to a number of court decisions which had construed the exemption so broadly that the records subject to disclosure were few. The amendment to Exemption 7 is as follows:

> investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings ... (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source. . .

The impact of this 1974 amendment was the subject of the Supreme Court's decision in National Labor Relations Board v. Robbins Tin and Rubber Company, ___ U.S. ____, 46 U.S.L.W. 4689 (June 15, 1978). It is helpful to the analysis of the issue presented in this case to set forth a number of the Supreme Court's conclusions in Robbins. In that case, after the NLRB filed an unfair labor practice complaint against the respondent employer, the respondent requested pursuant to FOIA, that the NLRB make available prior to hearing copies of all potential witnesses' statements collected during the NLRB's investigation. Relying on Exemption 7(A) of FOIA the Board denied respondent's request. The Supreme Court upheld the denial under Exemption 7(A). In Robbins Mr. Justice

Marshall writes:

> In light of this history, the Government is clearly correct that the 1966 Act was expressly intended to protect against the mandatory disclosure through FOIA of witnesss' statements prior to an unfair labor practice proceeding.
>
> . . .
>
> While the Court of Appeals was correct that the Amendment of Exemption 7 was designed to eliminate "blanket exemptions" for Government records simply because they were found in investigatory files compiled for law enforcement purposes, we think it erred in concluding that no generic determinations of likely interference can ever be made. We conclude that Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally "interfere with enforcement proceedings."
>
> . . .
>
> Although reasonable arguments can be made on both sides of this issue, for the reasons

> that follow we conclude that witness statements in pending unfair labor practice proceedings are exempt from FOIA disclosure at least until completion of the Board's hearing.

46 U.S.L.W. at 4693, 4695.

The Court specifically recognized and approved the fact that historically the NLRB has provided little prehearing discovery in unfair labor practice proceedings. That Court remarked:

> While the NLRB's discovery policy has been criticized, the Board's position that §6 of the NLRA, 29 U.S.C. §156, commits the formulation of discovery practice to its discretion has generally been sustained by the lower courts. A profound alteration in the Board's trial strategy in unfair labor practice cases would thus be effectuated if the Board were required, in every case in which witnesses' statements were sought under FOIA prior to an unfair labor practice proceeding, to make a particularized showing that release

> of these statements would interfere with the proceeding.

46 U.S.L.W. at 4695-96. As a result the Court left intact the NLRB's discovery philosophy suggesting that an alternative result has the result of causing delay in NLRB proceedings when dispatch is desirable.

I also note that in Robbins the litigation involved discovery concerning a pending unfair labor practice proceeding which the Court viewed as within the meaning of the Exemption 7(A) language, "interference with enforcement proceedings." The Court pointed out that "the most obvious risk of 'interference' with enforcement proceedings in this context is that employers or, in some cases,

unions will coerce or intimidate employees and others, who have given statements, in an effort to make them change their testimony or not testify at all." Robbins, supra, at 4696.

The Robbins opinion further comments on the evil the prophylactic rule is designed to cure:

> The danger of witness intimidation is particularly acute with respect to current employees--whether rank and file, supervisory, or managerial--over whom the employer, by virtue of the employment relationship, may exercise intense leverage. Not only can the employer fire the employee, but job assignments can be switched, hours can be adjusted, wage and salary increases held up and other more subtle forms of influence exerted. A union can often exercise similar authority over its members and officers. As the lower courts have recognized, due to the "peculiar character of labor litigation [,] the witnesses are especially likely

> to be inhibited by fear of the employer's or--in some cases--the union's capacity for reprisal and harrassment." Roger J. Au & Son, Inc. v. NLRB, 538 F.2d 80, 83 (CA3 1976). Accord, NLRB v. Harderman Garment Corp., 557 F.2d 559 (CA6 1977). While the risk of intimidation (at least from employers) may be somewhat diminished with regard to statements that are favorable to the employer, those known to have already given favorable statements are then subject to pressure to give even more favorable testimony.

Robbins, supra, at 4696.

Prehearing disclosure of witnesses' statements would involve the kind of harm that Congress believed would constitute an "interference with NLRB enforcement proceedings." Robbins, supra, at 4697.

Before concluding this discussion of the holding in Robbins, comment is directed to Mr. Justice Powell's concur-

rence in part and dissent in part. Differing from the majority, Mr. Justice Powell would construe Exemption 7(A) more narrowly and look to the potential for harm that the contested disclosure would affect. Speaking of the potential harm he perceives, he notes:

> Moreover, as the Court notes, many employees, mindful of the Board's prehearing settlement practice, may be willing to cooperate with the Board because they know that their identity will not be revealed and they will not be called to give public testimony adverse to their employer's interest unless such a course is absolutely necessary.

Robbins, supra, at 4699 (Powell, J., concurring in part and dissenting in part). (Emphasis added.)

Clearly, in Robbins it was the statements of witnesses that was sought, while here the Association seeks to examine

the employees' executed authorization cards. Whether this factual distinction is sufficiently great to render the reasoning of the Supreme Court in Robbins inapplicable to this case is an issue raised by the plaintiff.

Plaintiff argues (1) that the authorization cards are not investigatory records and (2) that the cards were not received by defendants "for law enforcement purposes." Since the cards were not executed or received as a part of an investigation, plaintiff urges that they are, therefore, not investigatory records compiled for law enforcement purposes. While it is true the cards were initially executed and forwarded to the Board for a purpose then only, at best, indirectly related to law enforcement, circumstance can operate to make the

cards relevant to a subsequent enforcement endeavor. In the instant case it is clear that the cards are important to the defendants' investigation into whether there has been an unfair labor practice. Determining such an issue is entirely consistent with the defendants' obligation to enforce the National Labor Relations Act.

In order to determine whether the information on the cards, which are not statements, should be entitled to a 7(A) exemption, it is necessary to consider the evil to be worked. As the Supreme Court in Robbins indicated, the harm the exemption was intended to avoid in the context of unfair labor practice proceedings was employer retaliation or subjection of an employee to an unfavorable employment position because of the

employee's manifested interest in having a union as his or her representative. Disclosure to an employer of the identity of an employee as a union proponent gives rise to the same kind of potential for harm as does disclosure to an employer that an employee has given the Board a statement that may be against the employer's position. The need for a prophylactic shelter for the identity of an employee who has signed an authorization card is the same or similar to the rationale for the protection of the witnesses' statements in Robbins. Disclosing the identity of those signing cards would have the potential to chill the desire for signing as a union supporter.

While this result is inapposite with

discovery under the Federal Rules of Civil Procedure, it is consonant with the tradition of the Board, which now clearly has Supreme Court acceptance. Moreover, as mentioned hereinabove, Mr. Justice Powell in Robbins specifically mentioned the problem of disclosure of an employee's identity. I believe that the authorization cards are exempt from disclosure pursuant to the Exemption 7(A).

III

The Board and Regional Director also rely on FOIA Exemption 6, which excludes from disclosure personnel and medical files and similar files the disclosure of which constitute a clearly unwarranted invasion of personal privacy. Utilization of Exemption 6 requires the delicate balancing of interests: the ser-

iousness of the invasion and the benefit of disclosure.

In Committee on Masonic Homes, etc. v. NLRB, 556 F.2d 214 (3d Cir. 1977) the Court of Appeals for the Third Circuit had before it the question of FOIA exemptions where an employer sought to obtain copies of individual union cards that were submitted to the Board in support of a petition by the union for a representative. Unlike the result I reach, the Third Circuit held that there was no exemption under 7(A), but the cards were exempt from disclosure under Exemption 6. Recognizing and affording the presumption in favor of disclosure, the Court in Masonic Homes held that the authorization cards were "similar" to personnel and medical files. The harm resulting from disclosure is described

as follows at page 221:

> For instance, it is entirely plausible that employees would be "chilled" when asked to sign a union card if they knew the employer could see who signed. If so, this is a harm that could not easily be corrected. To order disclosure here would effectively do away with union cards as they are used now. We need only consider whether employees would be as likely to sign a prominently displayed notice at work, "Sign up for the union here. Organize for better working conditions and higher wages." Solicitation of authorization cards plays a vital role in organizational campaigns, and we cannot envision a workable substitute.
>
> Furthermore, union elections must be conducted by secret ballot. Whatever reasons and policies lie behind that would be directly undercut by forcing employees to acknowledge in public their support of the union, in order to be given the right to vote in secret for the union.

Likewise, I believe cards are entitled to an exemption under 6 for the same

basic reason expressed in Masonic Homes.

In view of the above conclusions, there is no need to examine any of the other contentions regarding FOIA and the authorization cards.

IV

The defendants argue that the Advice memorandum which plaintiff seeks to examine is an inter-agency or intra-agency memorandum or letter not available to plaintiff in accordance with FOIA Exemption 5. The Court agrees with defendants in this regard. The memorandum was prepared to set forth the General Counsel's strategy in putative litigation before the Board. This Court believes that NLRB v. Sears Roebuck & Co., 421 U.S. 151 (1975) is pertinent precedent for non-disclosure of the Advice memorandum.

In Case No. C-2-78-529 the Court holds

that defendants' motion for summary judgment is well taken and is GRANTED.

Robert M. Duncan, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

Case No. C-2-78-785

NATIONAL LABOR RELATIONS BOARD,

Applicant,

v.

MARTINS FERRY HOSPITAL ASSOCIATION,

Respondent.

O R D E R

The National Labor Relations Board has applied for an order requiring the Martins Ferry Hospital Association to obey a Board-issued subpoena duces tecum issued by the Board in Board Case No. 8-CA-10755. The Court has considered the motion to stay proceedings filed by the Association and finds it not well

taken, and it is DENIED. Attention is called to the basic dispute between the Association and the Board and the Regional Director as set forth in the Court's ruling on a motion for summary judgment in Case No. C-2-78-529.

As a part of the pending administrative proceeding the Board is attempting to determine the majority status of 1199 and desires to use employee IRS "W-4" forms and/or other documents in the employer's possession bearing employee signatures in an attempt to verify the authorization cards in its possession. The Association has refused to obey the Board's subpoena duces tecum.

The Board's application is before the Court on the memoranda of counsel. The Court has also heard the oral arguments of the counsel at a hearing pursuant

to the Court's order to show cause. After a careful consideration of the contentions of the parties, the Court in exercise of its discretion GRANTS the Board's application for an order requiring the Association to obey the subpoena duces tecum.

Accordingly, the Martins Ferry Hospital Association is ORDERED to obey the National Labor Relations Board-issued subpoenas duces tecum, and the Association through its designated agent at such time and place as the Regional Director of Region 8 of the NLRB may determine, and there produce the records and other data described in the subpoena duces tecum served upon the respondent in Board Case No. 8-CA-10755.

Robert M. Duncan, Judge
United States District Court

NATIONAL LABOR RELATIONS BOARD

REGION 8

1695 Anthony J. Celebrezze Federal Building

1240 East Ninth Street

Cleveland, Ohio 44199

Telephone (216)522-3715

March 10, 1978

G. Roger King, Esq.
Bricker, Evatt, Barton & Eckler
100 East Broad Street
Columbus, OH 43215

Re: Martin's Ferry Hospital Association
Cases Nos. 8-RC-10584,
8-RC-10586,
8-RC-10587,
8-RC-10588

Dear Mr. King:

This will serve to acknowledge receipt of your March 6, 1978 letter in this office on March 9. In your letter, you ask that I provide you with a copy of certain authorization cards. Those

cards, which in effect are considered to be a showing of interest among other things, are not disclosable on the following bases.

Your request for documents revealing the showing of interest must be denied. Such documents are privileged from disclosure under Exemption 6 of Section 552(b) of the Freedom of Information Act, 5 U.S.C. Section 552(b)(6). This exemption operates to privilege from disclosure personnel and medical files and similar files not only of Agency personnel but also the files of other persons which might be in the possession of the Agency in the course of processing a case. Moreover, Exemption 6 requires the Board to balance the right of privacy of affected individuals against the right of the public to be informed.

Cf. Getman v. N.L.R.B., 450 F. 2d 670 (C.A.D.C.). Since you have submitted no showing of public interest which would, I find, overcome the privacy right of individuals, their right of privacy must prevail. Masonic Homes of Pennsylvania v. N.L.R.B., ____ F. 2d ____ (C.A. 3), No. 76-1925, issued May 2, 1977.

The investigatory records you request are privileged from disclosure by Exemptions 7(A) and (C) of Section 552(b) of the Freedom of Information Act, 5 U.S.C. Section 552(b)(7(A)) and (7(C)). Exemption 7(A) exempts from disclosure investigatory records where disclosure would interfere with enforcement proceedings. In the processing of cases much information is obtained from parties who would be reluctant or would refuse to supply such information if it

were routinely disclosable pursuant to a request under the Freedom of Information Act. In the administration of the Act, the Agency must be able to obtain in its investigations all potentially relevant information. The protection of the identities of individuals and the substance of the information they submit in the Agency's investigation is an important means of assuring the Agency's continuing ability to obtain such relevant information. If the Agency were forced to disclose information submitted or obtained during the investigation of the case, in circumstances other than those provided by Section 102.118(b) of the Board's Rules and Regulations, it would substantially deter voluntary cooperation, hinder obtaining information from all potential sources and,

consequently, substantially interfere with present and future enforcement proceedings. See, Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591 (D.C.P.R.); Clement Brothers Co. v. N.L.R.B., 282 F. Supp. 540 (D.C. Ga.) affmd., N.L.R.B. v. Clement Brothers Co., 407 F. 2d 1027 (C.A. 5); Wellman Industries, Inc. v. N.L.R.B., 490 F. 2d 427 (C.A. 4), cert. denied, 419 U.S. 834, cf. N.L.R.B. v. Scrivener, 405 U.S. 117; N.L.R.B. v. Golden Age Beverage Co., 415 F. 2d 26 (C.A. 5).

Also, since these investigatory records contain matter personal to the individuals supplying them, and to individuals referred to therein, they are exempt from disclosure under Exemption 7(C) of Section 552(b) of the Freedom of Information Act, 5 U.S.C. Section

552(b)(7)(C), for the considerations set forth under Exemption 6 above.

Further, Exemption 5 of the Freedom of Information Act exempts disclosure of the information you seek, the evidentiary material of parties submitted during investigation. That exemption incorporates the privileges which the Government enjoys under the relevant statutory and case law in the discovery context. Renegotiation Board v. Grumman Aircraft Corp., 421 U.S. 168, 184 (1975). Those privileges include the "executive privilege" for pre-decisional memoranda which reflect the Agency's deliberative process, and the "attorney work product privilege". See, N.L.R.B. v. Sears Roebuck and Co., 421 U.S. 132, 150-154 (1975). When an investigator takes an affidavit or statement in an unfair

labor practice investigation, it is done in anticipation of trial and must be viewed as attorney work product, which is not normally discoverable. Hickman v. Taylor, 329 U.S. 495, 512-513 (1947). Moreover, even if the results of the investigation do not warrant a finding that an unfair labor practice has been committed, the affidavits would still be used by the Regional Director in the administrative deliberations leading to the determination of whether or not issuance of a complaint is warranted. See, Brockway v. Department of the Air Force, 518 F. 2d 1184 (C.A. 8, 1975). See also, Hook Drugs, Inc. v. N.L.R.B., 91 LRRM 2801 (S.D. Ind., 1976); Jamco International, Inc. v. N.L.R.B., 91 LRRM 2446 (N.D. Okla, 1976).

The material you request is

privileged from disclosure by Exemptions 7(A), (C), and (D) of Section 552(b) of the Freedom of Information Act, 5 U.S.C. Section 552(b)(7(A)), (7(C)) and (7(D)). Exemption 7(A) exempts from disclosure investigatory records where disclosure would interfere with enforcement proceedings. In the investigation of unfair labor practice cases much information is obtained from individuals who would be reluctant or would refuse to supply such information if it were routinely disclosable pursuant to a request under the Freedom of Information Act. In the administration of the Act, the Agency must be able to obtain in its investigations all potentially relevant information. The protection of the identity of individuals and the substance of the information they submit in the Agency's

investigation is an important means of assuring the Agency's continuing ability to obtain such relevant information. Individuals supplying evidence in the investigation are given express assurances that such will not be disclosed unless and until the individual is called as a witness in a formal proceeding, as provided for in Section 102.118(b) of the Board's Rules and Regulations. If the Agency were forced to disclose evidence submitted or obtained during the investigation of the case, in circumstances other than those provided by Section 102.118(b) of the Board's Rules and Regulations, it would substantially deter voluntary cooperation of witnesses, hinder obtaining sworn information from all potential sources and, consequently, substantially

interfere with present and future enforcement proceedings. See, Goodfriend Western Corp., d/b/a Wrangler Wranch v. Fuchs, 535 F. 2d 145 (C.A. 1, 1976), cert. denied, October 18, 1976 (No. 76-51); New England Medical Center Hospital v. N.L.R.B., ____ F. 2d ____ (Cal., 1976), Civ. Action No. 76-1288 (C.A. 1, December 28, 1976); Title Guarantee Co. v. N.L.R.B., 534 F. 2d 484 (C.A. 2, 1976), cert. denied, 45 L.W. 3251 (October 4, 1976); Roger J. Au & Son, Inc. v. N.L.R.B., 538 F. 2d 80 (C.A. 3, 1976); Harvey's Wagon Wheel, et al. v. N.L.R.B., 93 LRRM 3069 (C.A. 9, 1976); Climax Molybdenum Co. v. N.L.R.B., ____ F. 2d ____, 92 LRRM 3466 (C.A. 10, 1976); The Cessna Aircraft Co. v. N.L.R.B., ____ F. 2d ____ (C.A. 10, 1976), Civ. Action No. 76-1121 (C.A. 10, October 18, 1976);

The Maremont Corp. v. N.L.R.B., ____ F. 2d ____ (C.A. 10, 1976), Civ. Action No. 76-1402 (C.A. 10, October 5, 1976); Atlas Industries, Inc. v. N.L.R.B., 92 LRRM 2676 (N.D. Ohio, 1976); Chrysler Corp. v. N.L.R.B., Civ. Action No. 5-72384 (E.D. Mich., July 7, 1976); Fotomat v. N.L.R.B., 92 LRRM 3708 (D.C. N.Ohio, 1976), appeal pending; N.L.R.B. v. Hardeman Garment Corp., 557 F.2d 559 (C.A. 6, 1977), 95 LRRM 2780.

Also, since this material contains matter personal to the individual supplying it and to individuals referred to therein, it is exempt from disclosure under Exemption 7(C). This exemption protects the personal privacy of individuals submitting material and individuals named therein, and requires the balancing of their interests in privacy

against the interest of a requesting party in disclosure. You have submitted no considerations which would, I find, overcome the privacy rights of individuals and, therefore, their right of privacy must prevail. L'eggs Products, Inc. v. N.L.R.B., 93 LRRM 2488 (D.C. C.Cal., 1976).

The requested material is also within Exemption 7(D) because its disclosure would reveal the identity of a confidential source, i.e., an individual who provides information under an express assurance of confidentiality or in circumstances from which such assurances can reasonably be inferred. As noted above, individuals giving such material to the Agency during the investigation are advised and assured that it will remain confidential, except as provided by

Section 102.118 of the Board's Rules and Regulations. This policy of protecting confidential sources of information has been consistently followed in the administration of the Act and is well known to those persons dealing with this Agency. Accordingly, since the individuals furnishing evidence in the instant case are confidential sources, Exemption 7(D) authorizes our refusal to supply the requested material. ITT American Electric v. N.L.R.B., 92 LRRM 2815 (N.D. Miss., 1976); Kaminer v. N.L.R.B., 90 LRRM 2269 (D.C. S. Miss., 1976); The Baptist Memorial Hospital v. N.L.R.B., 92 LRRM 2645 (W.D. Tenn., 1976), appeal pending; Vegas Village Shopping Corp. v. N.L.R.B., 92 LRRM 2683 (C.D. Cal., April 26, 1976), appeal pending.

The undersigned is responsible for the determination that the records you have requested are privileged from disclosure under the Freedom of Information Act. You may obtain a review of that determination under the provisions of Section 102.117(c)(2)(ii) of the Board's rules by filing an appeal with the General Counsel, National Labor Relations Board, Washington, D.C., 20570, within 20 days (excluding Saturdays, Sundays and legal holidays) from the receipt of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Very truly yours,

/s/ Bernard Levine

Bernard Levine
Regional Director

cc: Office of Appeals
National Labor Relations Board
Washington, D.C. 20570

George Kobell, Asst. General Counsel

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

April 7, 1978

G. Roger King, Esquire
Bricker, Evatt, Barton & Eckler
100 East Broad Street
Columbus, Ohio 43215

Re: Martins Ferry Hospital Assn.
Case Nos. 8-RC-10584
8-RC-10586
8-RC-10587
8-RC-10588

Dear Mr. King:

Your appeal from the Regional Director's refusal to furnish information you requested by letter dated March 6, 1978, has been duly considered.

The appeal is denied substantially for the reasons set forth in the Regional Director's letter of March 10, 1978.

As to your request for authorization cards, it is our position that such material is exempt from disclosure by FOIA

exemptions 6 and 7(A), (C) and (D). See The Committee On Masonic Homes of the R.W. Grand Lodge, F&AM of Pennsylvania v. N.L.R.B., 556 F.2d 214; L'Eggs Products, Inc. v. N.L.R.B., 93 LRRM 2488 (D.C.Cal., 1976); N.L.R.B. v. Bio-Physics Systems, Inc., 91 LRRM 3079 (S.D. N.Y., April 12, 1976); Howard Johnson Co., Inc. v. N.L.R.B., 96 LRRM 2214.

Robert E. Allen, at the direction of and pursuant to the policies established by General Counsel John S. Irving, is responsible for the determination that the records you requested are privileged from disclosure under the FOIA.

Judicial review of this determination may be obtained by filing a complaint in the district court of the United States in the district in which the complainant

resides, or has his place of business, or in which the records are situated, or in the District of Columbia, as provided in the FOIA, 5 U.S.C. Section 552(a)(4)(B).

Very truly yours,

John S. Irving
General Counsel

By _____
Robert E. Allen
Director, Office of
Appeals

cc: Director, Region 8

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RUEVEKJ.

NLRB

FM - GEORGE LEET ASSOC EXEC SECY NLRB

WSH DC TO RUEVEKJ/2/DENIS GRANT ESQ G

ROGER KING ESQ BRINCKER EVATT BARTON AND

ECKLER 100 EAST BROAD STREET COLUMBUS

OHIO 43215 TO RUEVEKJ/2/NLRB REG 8

CLEVENALD OH

BT

RE MARTINS FERRY HOSPITAL ASSOCIATION 8

CA 10755 RESPONDENT'S PETITION TO REVOKE

SUBPOENA DUCES TECUM IS DENIED ON THE

GROUND THAT THE INFORMATION SOUGHT

APPEARS TO BE RELEVANT TO THE MATTER

UNDER INVESTIGATION. BY DIRECTION OF

THE BOARD:

BT

G.S.A. TELETYPE CLEVELAND

JUN 1 5:08 P.M. '78

ATTACHMENT NO. 2

NATIONAL LABOR RELATIONS BOARD
REGION 8
1695 Anthony J. Celebrezze Federal Bldg.
1240 East Ninth Street
Cleveland, Ohio 44199

Telephone: 216/522-3715

July 25, 1978

Dennis D. Grant, Esq.
Bricker, Evatt, Barton & Eckler
100 East Broad Street
Columbus, Ohio 43215

Re: MARTINS FERRY HOSPITAL ASSOCIATION Case No. 8-CA-10755

Dear Mr. Grant:

This will serve to acknowledge receipt of your letter of July 11, 1978 which was received in this office on July 17, 1978. I cannot comply with your request that this office issue subpoenas duces tecum directing National Union of Hospital and Health Care Employees; Licensed Practical Nurse and Skilled Hospital Employees Professional and

Economic Security Program, Inc.; Service Employees International Union, Local 47, AFL-CIO and Joan Kalhorn, a field examiner in this office, to appear before you on July 31, 1978, at Martins Ferry Hospital Association in order that they testify in the above-noted matter and further requiring them to produce at that time all union authorization and membership cards in the appropriate unit at the Hospital.

The General Counsel of the National Labor Relations Board on behalf of the Board has the final authority with respect to the investigation of charges and the issuance of complaints under the National Labor Relations Act, as amended. During an investigation of such charges, the General Counsel may determine that it is necessary to resort to subpoenas

in order to ascertain the facts on which to base an administrative decision on the merits. However, there is no comparable right to an investigative subpoena available to parties other than the General Counsel. The National Labor Relations Board Casehandling Manual (Part I), Unfair Labor Practice Proceedings, Section 11770.

Moreover, compliance with your request would be tantamount to allowing you to use prehearing discovery. However, the courts have consistently held that such discovery is within the Board's discretion, which the Board has uniformly declined to allow. NLRB v. Vapor Blast Mfg. Co., 287 F.2d 402 (CA7 1961); Electromec Design & Development Co. v. NLRB, 409 F.2d 631, 635 (CA9 1969);

NLRB v. Interboro Contractors, Inc., 432 F.2d 854, 858 (CA2 1970). cert denied, 402 U.S. 915 (1971); D'Youville Manor. Lowell, Mass., Inc. v. NLRB, 526 F.2d 3. 7 (CA1 1975); NLRB v. Valley Mold Co., 530 F.2d 693, 695 (CA6 1976).

Furthermore, the investigatory records you request that I allow you to subpoena which are in the Board's possession are privileged from disclosure by Exemptions 7(A) and (C) of Section 522(b) of the Freedom of Information Act, 5 U.S.C Section 552(b)(7(A)) and (7(C)). Exemption 7(A) exempts from disclosure investigatory records where disclosure would interfere with enforcement proceedings. In the processing of cases much information is obtained from parties who would be reluctant or would refuse to supply such information if it were

routinely disclosable pursuant to a request under the Freedom of Information Act. In the administration of the Act, the Agency must be able to obtain in its investigations all potentially relevant information. The protection of the identities of individuals and the substance of the information they submit in the Agency's investigation is an important means of assuring the Agency's continuing ability to obtain such relevant information. If the Agency were forced to disclose information submitted or obtained during the investigation of the case, in circumstances other than those provided by Section 102.118(b) of the Board's Rules and Regulations, it would substantially deter voluntary cooperation, hinder obtaining information from all potential sources and, consequently,

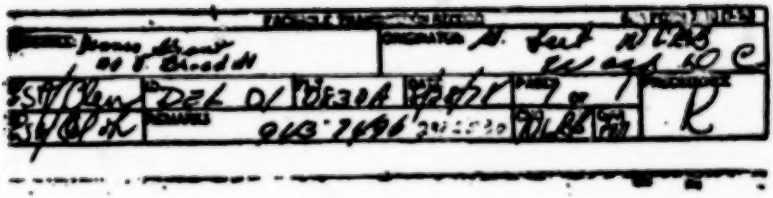
substantially interfere with present and future enforcement proceedings. See, Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591 (D.C.P.R.); Clement Brothers Co. v. N.L.R.B._, 289 F. Supp. 540 (D.C. Ga.) affmd, N.L.R.B. v. Clement Brothers Co., 407 F.2d 1027 (C.A. 5); Wellman Industries, Inc. v. N.L.R.B., 490 F.2d 427 (C.A. 4), cert denied, 419 U.S. 834; cf. N.L.R.B. v. Scrivener, 405 U.S. 117; N.L.R.B. v Golden Age Beverage Co., 415 F.2d 26 (C.A. 5).

Therefore, I am denying your request that this office issue the subpoenas duces tecum you requested.

Very truly yours,

John Kollar
Acting Regional
Director

JK/ram



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RUEVEKJ.

NLRB

FM GEORGE LEET ASSOC EXEC SECY NLRB

WSH DC

TO RUEVEKJ/2/DENIS GRANT ESQ AND G. ROGER KING ESQ BRINCKER EVATT BARTON AND ECKLER 100 EAST BROAD ST COLUMBUS OH 43215 614 227-2300

TO RUEVEKJ/2/NLRB REG 8 CLEVELAND OH

BT

RE MARTINS FERRY HOSPITAL ASSOCIATION

8 CA 10755 RESPONDENT'S REQUEST FOR PER-

MISSION TO APPEAL THE REGIONAL DIRECTOR'S RULING DENYING REQUESTS FOR SUBPOENAS IS HEREBY DENIED. BY DIRECTION OF THE BOARD DATED AUG. 28, 1978

BT

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 79-3408

NATIONAL LABOR RELATIONS BOARD,

Plaintiff-Appellee,

v.

MARTINS FERRY HOSPITAL ASSOCIATION,

Defendant-Appellant.

Before: LIVELY and MERRITT, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

J U D G M E N T

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on

the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now where ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed as modified in accordance with the opinion filed this date.

Each party to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT

_____
Clerk

Issued as Mandate:

COSTS:

Filing Fee....$

Printing $

Total $

A True Copy.

Attest:

_____
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 80-3118

MARTINS FERRY HOSPITAL ASSOCIATION,

Plaintiff-Appellant,

vs.

NATIONAL LABOR RELATIONS BOARD, JOHN FANNING and BERNARD LEVINE,

Defendants-Appellees.

Before: WEICK, KENNEDY, and MARTIN, Circuit Judges

J U D G M E N T

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States

District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendant-Appellee recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

_____
Clerk

Issued as Mandate: A True Copy

COSTS: Attest:

Filing Fee.....$

Printing $ _____
Deputy, Clerk

Total $

APPENDIX D

LABOR

29 § 161

SUBCHAPTER II -- NATIONAL LABOR RELATIONS -- Cont'd

§ 161.

Investigatory powers of Board

For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title -- Documentary evidence; summoning witnesses and taking testimony

(1) The Board or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that

relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such

subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public --

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information,

make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and

adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available

for public inspection and copying --

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of

policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonethe-

less provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if --

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance

with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public

interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this

section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practical date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against

the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection shall --

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is ex-

pected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request --

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all

practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional

time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are --

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the in-

ternal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party

other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority

in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonable segregable portion of a record shall be provided to any

person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include --

(1) the number of determinations made by such agency not to comply

with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reasons for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the

officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of

the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551 (1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

Opposition

Office - Supreme Court, U.S.
FILED
NOV 10 1981

No. 81-486

In the Supreme Court of the United States

OCTOBER TERM, 1981

MARTINS FERRY HOSPITAL ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether court enforcement of an otherwise proper subpoena duces tecum requiring the Hospital to submit documents to the Board's General Counsel to aid in his investigation of unfair labor practice charges against the Hospital violated the Due Process Clause because the Hospital was not granted reciprocal discovery during that pre-complaint investigation.

2. Whether the union authorization cards sought by the Hospital are exempt from disclosure under Exemptions 6 and 7(A) of the Freedom of Information Act.

3. Whether the Hospital failed to establish that it was plainly entitled under Section 11(1) of the National Labor Relations Act to the issuance of subpoenas during the General Counsel's investigation of an unfair labor practice charge and thus was not entitled to mandamus relief from the district court under 28 U.S.C. 1361.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-486

MARTINS FERRY HOSPITAL ASSOCIATION, PETITIONER

v.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in Nos. 79-3408 and 79-3409 (Pet. App. A1-A18)[1] is reported at 649 F.2d 445. The opinions of the district court in No. C-2-78-529 (Pet. App. B26-B47) and in No. C-2-78-785 (Pet. App. B48-B50) are not reported.

The opinion of the court of appeals in No. 80-3118 (Pet. App. A18-A24) is reported at 654 F.2d 455. The opinion of the district court in No. C-2-79-826 (Pet. App. B1-B25) is not reported.

[1] "Pet. App." refers to the corrected, separately bound appendix to the petition.

JURISDICTION

The judgment of the court of appeals in Nos. 79-3408 and 79-3409 was entered on May 27, 1981. The judgment of the court of appeals in No. 80-3118 was entered on July 17, 1981. The petition for a writ of certiorari was filed on August 25, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.* ("NLRA") and the Freedom of Information Act, 5 U.S.C. 552 ("FOIA"), are set forth at Pet. App. D1-D26.

STATEMENT

1. Martins Ferry Hospital Association ("the Hospital") operates a hospital in Martins Ferry, Ohio. On December 16, 1976, the Board conducted elections in three separate units at the Hospital. The Board elections were initiated by two different labor organizations, each claiming to represent a majority or substantial number of voters in one, two, or all of the units, as evidenced by signed authorization cards (Pet. App. A5-A6).[2] A majority of eligible voters in each of the three units voted against representation by any labor organization (Pet. App. A6-

[2] The Licensed Practical Nurse and Skilled Employees Professional and Economic Security Program, Inc. (LPN-SHEP) claimed representation of at least 30% of the Hospital's technical employees. Local 1199, National Union of Hospital and Health Care Employees (Local 1199), claimed 30% support in two of the three units and substantial support in the third. LPN-SHEP and Local 47, Service Hospital, Nursing Home and Public Employees Union, intervened with respect to one of Local 1199's petitions for an election. (Pet. App. A5-A6.)

A7). Local 1199 filed timely objections to the elections (Pet. App. A7).

On January 24, 1977, Local 1199 filed an unfair labor practice charge, alleging that pre-election misconduct by the Hospital had made it impossible to hold free and fair elections. It also claimed that Local 1199 had represented a majority of the Hospital's employees, as evidenced by signed authorization cards, and that the Hospital had unlawfully refused to bargain with it. Local 1199 requested the Board to remedy these alleged violations of the NLRA by issuing an order requiring the Hospital to bargain with Local 1199 as the exclusive representative of the employees in the respective bargaining units (Pet. App. A7).

In the course of the General Counsel's investigation of Local 1199's charge, the Board issued to a field examiner a subpoena duces tecum directing the Hospital to produce IRS W-4 forms or other documents bearing employee signatures (Pet. App. A8). The General Counsel sought the subpoenaed documents to verify signatures on the authorization cards submitted by Local 1199 in support of its charge and to determine whether there was prima facie evidence to support Local 1199's allegation of majority status (*ibid.*).[3] The Hospital filed a petition to revoke the subpoena. On June 1, 1978, the Board denied the Hospital's petition, stating that the "information sought appear[ed] to be relevant to the

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[3] In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 614 (1969), this Court held that the Board may issue a bargaining order to remedy employer unfair labor practices which have undermined the majority strength of a union to so great an extent as to prevent the holding of a fair election "where there is * * * a showing that at one point the union had a majority."

matter under investigation" (*ibid.*). The Hospital refused to comply with the subpoena (Pet. App. A8).

Meanwhile, the Hospital attempted to obtain access to the authorization cards to make its own handwriting comparison. On March 6, 1978, the Hospital requested the Board, under the FOIA, to turn over all authorization cards allegedly executed by its employees and submitted by Local 1199 in support of its election petitions (Pet. App. A9). The Regional Director denied the Hospital's request on the ground that the authorization cards were exempt from disclosure under the FOIA (Pet. App. B51-B65). The Hospital filed a request for review of the Regional Director's decision. The Board's General Counsel denied its appeal on April 7, 1978. (Pet. App. B66-B68.)

On July 11, 1978, the Hospital requested the Board to issue it several subpoenas duces tecum directing each of the three labor organizations involved in the elections and the field examiner investigating Local 1199's charge to turn over the originals or true copies of all authorization cards signed by its employees during the pre-election period of July through October, 1976 (Pet. App. A20-A21). On July 25, 1978, the Acting Regional Director denied the Hospital's request, and, by order of August 28, 1978, the Board denied the Hospital permission to appeal the Regional Director's ruling (Pet. App. B70-B77).

2. On August 1, 1978, the Board filed an application in a United States district court for an order requiring the Hospital to obey its subpoena duces tecum for the IRS W-4 forms. On February 5, 1979, the district court granted the Board's application and ordered the Hospital to obey the Board's subpoena. (Pet. Apps. A8, B48-B50.)

On June 5, 1978, the Hospital filed a complaint in the district court seeking an order requiring the

Board to produce the union authorization cards sought by the Hospital in its FOIA request. On February 5, 1979, the court granted the Board's motion for summary judgment, holding that the authorization cards were exempt from disclosure under Exemptions 7(A) and 6 of the FOIA, 5 U.S.C. 552 (b)(7)(A) and (6). (Pet. Apps. A9, B26-B47.) Specifically, the court held that the authorization cards were "investigatory records compiled for law enforcement purposes" under Exemption 7(A) and that the "need for a prophylactic shelter for the identity of an employee who has signed an authorization card is the same or similar to the rationale for the protection of the witnesses' statements in [*NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978)]" (Pet. App. B42). Additionally, the court held that the authorization cards were "similar" to personnel and medical files and met the other applicable criteria for exemption from disclosure under Exemption 6 (Pet. App. B43-B46).

The Hospital appealed the district court's decision in each case and the cases were consolidated on appeal. The court of appeals affirmed the district court's decision that the union authorization cards sought by the Hospital are exempt from disclosure under the FOIA. It held that "[a]uthorization cards, like the witness statements in *Robbins Tire*, are investigatory records in the possession of the Board for enforcement purpose[s, that such] cards are not discoverable by an employer under the rules of the Board, and [that] discovery cannot be attained under the [FOIA]." (Pet. App. A14-A15.)

With respect to the Board's subpoena enforcement case, the court of appeals agreed with the district court that the subpoenaed IRS W-4 forms were

related to the matter under investigation by the Board (Pet. App. A10). The court of appeals noted that the Board was attempting to establish the majority status of Local 1199 as evidenced by the authorization cards and that its internal rules require its personnel to establish the authenticity of the signatures on the cards before issuing a complaint (Pet. App. A11). The court of appeals modified the district court's order, however, to permit the Hospital to obliterate all personal information, "except the full name and address, social security number and signature of the employee and the date the W-4 was signed," to meet its asserted need to protect the privacy of its employees (Pet. App. A13). The court of appeals affirmed the district court's order, as modified, enforcing the Board's subpoena (Pet. App. A13-A14).

The court of appeals also rejected the Hospital's claim that the Board's practice of engaging in prehearing discovery while denying the Hospital "equal discovery" denied the Hospital its Fifth Amendment right to substantive due process (Pet. App. A15). The court of appeals noted that the Hospital will be entitled to a hearing and the opportunity to compare signatures if a complaint issues in the Board proceedings; the Hospital can also challenge any failure to accord due process by petitioning the court of appeals to review the Board proceedings after a final order issues. (Pet. App. A15-A16).[4]

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[4] On July 6, 1981, the Hospital moved the court of appeals to stay its mandate pending this Court's decision on the Hospital's petition for a writ of certiorari. The Board opposed the Hospital's motion. On July 30, 1981, the court of appeals, concluding that "a petition for certiorari in this case would be frivolous and filed merely for purposes of delay," ordered that the mandate issue 25 days from the date of the court of

3. The Hospital filed another complaint in the district court on September 6, 1979, seeking an order compelling the Board to issue it investigative subpoenas directing the three unions and the Board's field examiner to turn over the originals or true copies of all authorization cards signed by its employees during the pre-election period. On December 11, 1979, the district court dismissed the Hospital's complaint for lack of jurisdiction under 28 U.S.C. 1361 (Pet. App. B1-B25). The court held that mandamus did not lie because the Hospital had failed to establish that the Board had an "indisputable and preemptory" duty to issue investigative subpoenas to the Hospital under Section 11(1) of the NLRA, 29 U.S.C. 161(1). (Pet. App. B23.) Specifically, it noted that, under the Board's interpretation of Section 11(1), "a [private] party may obtain a subpoena only after the Board has issued a complaint in a case—only then are there 'proceedings' to which the applicant can be a party" (Pet. App. B13). The district court concluded that "the Board's interpretation of § 11(1) and resulting practice are not clearly wrong" and, accordingly, held that the Hospital was not entitled to mandamus relief (Pet. App. B14).

The court of appeals affirmed. It concluded that the word "proceeding" in Section 11(1) "is not without ambiguity" and held that the Board's alleged duty to issue the Hospital investigative subpoenas before any complaint has issued, "is not so clearly established that the Hospital is entitled to mandamus relief" (Pet. App. A23.)

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appeals' order unless a Justice of this Court granted a stay before the expiration of the 25-day period. On August 24, 1981, Justice Powell denied the Hospital's application to this Court for a stay. On September 23, 1981, the Hospital's further application for a stay was denied by the full Court.

ARGUMENT

The three issues presented for this Court's consideration all involve the Hospital's claim that it is entitled to "reciprocal" or "equal" discovery during the period of the General Counsel's administrative investigation of an unfair labor practice charge, conducted under the authority of Section 3(d) of the NLRA, 29 U.S.C. 153(d), for the purpose of determining whether an unfair labor practice complaint should issue. The court of appeals rejected the Hospital's claim in all three forms: as a due process requirement under the Fifth Amendment, as a FOIA request, and as a claim to mandamus relief under 28 U.S.C. 1361, based on the Hospital's interpretation of Section 11(1) of the NLRA. The decisions below are correct and there is no conflict among the circuits. Further review by this Court therefore is not warranted.

1. The Hospital no longer contests the validity of the Board's subpoena before this Court.[5] Rather, it argues (Pet. 22-24) that "the basic tenets of due process" bar the Board's subpoena enforcement action unless the Hospital is accorded the same discovery rights that the General Counsel possesses at the pre-complaint, investigatory stage of the Board's process. Specifically, the Hospital contends (Pet. 23-24) that the General Counsel is not entitled to make an initial handwriting comparison using the subpoenaed W-4 forms, in order to determine whether to

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[5] Before the court of appeals, the Hospital asserted that the subpoena was overbroad and interfered with its employees' privacy interests (Pet. App. A12). The court of appeals modified the district court's order to permit the Hospital to expunge all personal information, except the signatures and the information necessary to identify the signer (Pet. App. A13-A14).

issue a complaint, unless the Hospital is allowed access to the authorization cards in the possession of the Board and the several unions to make its own handwriting comparison, in order to prepare for an unfair labor practice hearing that may occur if the General Counsel decides to issue a complaint. There is no merit to this contention.

As this Court noted in *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 236-237 & n.16 (1978), the courts of appeals generally agree that private litigants do not have a Fifth Amendment due process right to discovery in Board proceedings. In any event, the Hospital's claim is not properly raised at this preliminary stage of the Board's proceedings. A claim that Board action has denied a party due process can properly be raised only as a defense to enforcement of a final Board order in an unfair labor practice proceeding. *Myers* v. *Bethlehem Shipbuilding Co.*, 303 U.S. 41, 49 (1938). A claim of denial of due process is not properly raised as a defense to enforcement of a Board subpoena. *Cudahy Packing Co.* v. *NLRB*, 117 F.2d 692, 694 (10th Cir. 1941); *NLRB* v. *Frederick Cowan & Co.*, 522 F.2d 26, 28 (2d Cir. 1975). See *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509 (1943). This rule clearly applies to allegations of procedural irregularities in the administrative proceeding, including the Board's refusal to furnish information to a private litigant before the agency. See, *e.g.*, *NLRB* v. *Dutch Boy, Inc.*, 606 F.2d 929, 932-933 (10th Cir. 1979); *Storkline Corp.* v. *NLRB*, 298 F.2d 276, 277 (5th Cir. 1962); *NLRB* v. *Daniel Construction Co.*, 418 F.2d 790, 792 (4th Cir. 1969); *NLRB* v. *C.C.C. Associates, Inc.*, 306 F.2d 534, 538-539 (2d Cir. 1962).

This procedure results in no prejudice to the Hospital. As the court of appeals noted, if the General Counsel's investigation results in the issuance of an unfair labor practice complaint, the Hospital will be entitled "to a due process hearing" and an opportunity to make its requested handwriting comparison at that hearing. Should it still feel deprived of due process, the Hospital may challenge the Board's procedure by a petition to review filed in the court of appeals (Pet. App. A15-A16).

2. Nor is there merit to petitioner's contention (Pet. 15-22) that the disclosure of the authorization cards may be compelled under the FOIA.

First, as the district court, affirmed by the court of appeals, correctly found, those cards, which reveal the union sympathies of the signers, are excepted from FOIA disclosure requirements by Exemption 6, which applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" (Pet. App. B43). As the Third Circuit has explained in *Committee on Masonic Homes* v. *NLRB*, 556 F.2d 214, 220-221 (1977), union authorization cards reveal personal information qualifying them as "similar files" under Exemption 6, and their compelled disclosure is a "serious" invasion of the privacy of employees, whose willingness to sign such cards would clearly be chilled "if they knew the employer could see who signed." Accord: *Pacific Molasses Co.* v. *NLRB*, 577 F.2d 1172, 1180-1183 (5th Cir. 1978); *Madeira Nursing Center, Inc.* v. *NLRB*, 615 F.2d 728 (6th Cir. 1980). And that invasion of privacy is "clearly unwarranted" since there is, as the *Masonic Homes* court noted (556 F.2d at 221), "no significant public interest in disclosure." To the

contrary, compelled disclosure under the FOIA would undermine the public interest in promoting the policies of the labor laws (*ibid.*; footnotes omitted):

> [U]nion elections must be conducted by secret ballot. Whatever reasons and policies lie behind that would be directly undercut by forcing employees to acknowledge in public their support of the union, in order to be given the right to vote in secret for the union.

Accord: *Pacific Molasses Co.* v. *NLRB*, *supra*, 577 F.2d at 1181-1182.

In addition, the court of appeals properly relied on *NLRB* v. *Robbins Tire & Rubber Co.*, *supra*, concluding (Pet. App. A14) that authorization cards, like the witness statements in *Robbins Tire*, are "investigatory records compiled for law enforcement purposes" whose production would "interfere with enforcement proceedings" under Exemption 7(A). In *Robbins Tire*, as here, a union which had lost a representation election filed objections to the election and an unfair labor practice charge. After an investigation during which statements were obtained from employees, a complaint issued and the objections were consolidated for hearing with the unfair labor practice complaint. The Board denied the company's request for pre-hearing disclosure of the witness statements under the FOIA. This Court approved the Board's refusal, holding that the statements were privileged from disclosure under Exemption 7(A) at least until the hearing was completed. In reaching this result, this Court made it clear that the FOIA was not intended to be used as a tool to expand the existing limitations on discovery in Board proceedings.

Authorization cards, like witness statements, are not discoverable before trial under the Board's rules.[6] Their compelled disclosure under the FOIA not only would change substantive discovery rules and create a "profound alteration in the Board's trial strategy" but it would do so "through mechanisms likely to cause substantial delays in the adjudication of unfair labor practice charges." *NLRB* v. *Robbins Tire & Rubber Co., supra*, 437 U.S. at 237-238. Disclosure of the authorization cards would also seriously disrupt and delay representation proceedings, which are also "aimed at enforcement of the NLRA." *Wellman Industries, Inc.* v. *NLRB*, 490 F.2d 427, 430 (4th Cir. 1974).[7] In addition, authorization cards, like witness statements, contain information that unions or employees might well refuse to provide the Board if the FOIA required its disclosure to the employer—another instance of "the kind of harm that Congress believed would constitute an 'interference' with NLRB

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[6] Board practice permits disclosure of union authorization cards only in those instances where the General Counsel seeks to introduce them as evidence in an unfair labor practice case.

[7] Because representation proceedings are a crucial part of the enforcement of the NLRA, we submit that the Third Circuit wrongly held in *Committee on Masonic Homes* v. *NLRB, supra*, 556 F.2d at 218-219, that authorization cards which are the subject of a representation proceeding, but not also an unfair labor practice proceeding, are not exempt under Exemption 7(A). In any event, *Committee on Masonic Homes*, relied on by the Hospital (Pet. 16-17), is distinguishable from the present case on precisely that ground: here, the authorization cards were the subject of an unfair labor practice charge as well as a representation proceeding and were, therefore, "compiled for law enforcement purposes" even under the Third Circuit's interpretation. Of course, as noted above (page 10, *supra*), *Masonic Homes* supports the decision below on the Exemption 6 ground.

enforcement proceedings." *NLRB* v. *Robbins Tire & Rubber Co., supra,* 437 U.S. at 240.[8]

3. The district court, affirmed by the court of appeals, properly held that petitioner was not entitled to mandamus relief under 28 U.S.C. 1361, compelling the Board to issue investigative subpoenas under Section 11(1) of the NLRA, 29 U.S.C. 161(1), to enable it to obtain discovery during the General Counsel's investigation of an unfair labor practice case. As the court of appeals recognized (Pet. App. A23), "[b]efore petitioner may resort to the extraordinary writ of mandamus, he must establish that he has a clear and certain right and that the duties of the respondent are ministerial, plainly defined and

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[8] The Hospital unpersuasively contends (Pet. 17) that the authorization cards were not "compiled for law enforcement purposes" within the meaning of Exemption 7(A) because they are "commercial documents which were not even compiled by the Board and had no connection with any proceeding when they came into being." But the term "compiled," as used in Exemption 7, refers to an *agency's* collection of information, not to the compilation of the data before it came into government hands. Any other construction of the term would require release of documents, otherwise clearly exempt under Exemption 7, merely because the documents were first gathered by a private individual or entity and then submitted to the government for compilation in its investigatory records. For example, an affidavit of a potential witness in a Board hearing, while exempt if taken by a Board agent, would have to be disclosed under the FOIA if submitted to the Board by a charging party or an employer. Such a construction of Exemption 7 is supported neither by congressional intent nor by case law under the FOIA. See, *e.g.*, *NLRB* v. *Hardeman Garment Corp.*, 557 F.2d 559 (6th Cir. 1977), and cases cited therein.

preemptory."[9] Contrary to petitioner's contention (Pet. 8-15), the language of Section 11(1) of the NLRA requiring the Board to issue subpoenas "upon application of any party to such proceedings" does not plainly establish petitioner's right, as a charged party in an unfair labor practice case, to obtain subpoenas after a charge is filed and before a complaint issues.

The Board has consistently held that a private litigant before the agency, such as the Hospital, is not a "party to such proceedings" under Section 11(1) at least until a complaint issues in an unfair labor practice case. Thus, the Board has consistently interpreted Section 11(1) to require the issuance of subpoenas to private parties only where the subpoena is used to compel testimony or the production of documents at a hearing. Section 11770, *NLRB Casehandling Manual (Part One) Unfair Labor Practice Proceedings.*

The Board construes Section 11(1) as authorizing the issuance of investigative subpoenas only to the General Counsel during the investigation of both representation and unfair labor practice cases. The object of the investigative subpoena in an unfair labor practice case, such as this one, is to provide the General Counsel information by which to determine whether the allegations of the charge are supported by evidence and, then, whether to issue a complaint against the charged party. The Board's interpretation of Section 11(1) comports with the statutory scheme giving the General Counsel final, unreviewable authority over the investigation of charges and

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[9] Accord: *Wilbur* v. *United States ex rel. Kadrie*, 281 U.S. 206, 218-219 (1930); *United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U.S. 540, 543 (1937).

the issuance of complaints,[10] and also is in accord with the Board's longstanding practice of limiting pre-hearing discovery in unfair labor practice cases. *Schrementi Brothers* v. *McCulloch*, 69 L.R.R.M. 2233, 2234-2235 (N.D. Ill. 1968). See also *Bristol-Myers Co.* v. *FTC*, 469 F.2d 1116, 1119-1120 (2d Cir. 1972) (Mansfield, J., concurring). While the statutory language is, as the court of appeals noted (Pet. App. A23), "not without ambiguity," the Board's interpretation is not "clearly wrong." Nor is "the official action arbitrary and capricious." *Hammond* v. *Hull*, 131 F.2d 23, 25 (D.C. Cir. 1942), cert. denied, 318 U.S. 777 (1943) (footnote omitted). See *Wilbur* v. *United States ex rel. Kadrie*, 281 U.S. 206, 219 (1930). Given the Board's reasonable, longstanding interpretation of the statute to preclude the issuance of investigative subpoenas to private litigants, the court of appeals properly held that "the duty which the Hospital contends is imposed * * * is not so clearly established that the Hospital is entitled to mandamus relief" [11] (Pet. App. A23).

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[10] Section 3(d) of the NLRA, 29 U.S.C. 153(d); *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); *Mayer* v. *Ordman*, 391 F.2d 889 (6th Cir.), cert. denied, 393 U.S. 925 (1968); *NLRB* v. *Lewis*, 310 F.2d 364 (7th Cir. 1962).

[11] The Hospital's reliance (Pet. 8-11) on *D.B. Lewis* v. *NLRB*, 357 U.S. 10 (1958), is misplaced. In *Lewis*, this Court stated that "the issuance of subpoenas is mandatory" but only "[u]pon application of a proper party." *Id.* at 14, 15. In deciding who is a "proper party," the Court held only that the General Counsel is a "party" under Section 11(1) to an unfair labor practice proceeding and entitled to obtain subpoenas requiring the attendance and testimony of witnesses at an unfair labor practice hearing. 357 U.S. at 15-16, 11-12. It did not treat the issue presented here—whether a charged party is a "party" to the General Counsel's investigation and is entitled under Section 11(1) to obtain subpoenas

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1981

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compelling the production of evidence not only before a hearing but before a complaint issues.

Equally misplaced is the Hospital's reliance (Pet. 11-13) on the use of the word "proceedings" in the Board's rules. The Board's Rules and Regulations, Series 8 (29 C.F.R. Part 102), like the NLRA, do not define "proceedings." Section 102.31 of the regulations simply paraphrases the statutory language found in Section 11(1). In such circumstances, the use of the word in differing contexts with varying meanings throughout the Board's rules can hardly compel the conclusion that "proceedings" in Section 11(1) must include "investigations," as the Hospital contends. The Hospital's reliance on the interpretation of "proceedings" in the different contexts presented in *Rice* v. *United States*, 356 F.2d 709 (8th Cir. 1966); *United States* v. *Fruchtman*, 421 F.2d 1019 (6th Cir. 1970); *United States* v. *Vixie*, 532 F.2d 1277 (9th Cir. 1976), is subject to the same flaw.

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